TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 228

GEORGE A. OHL & COMPANY, PETITIONER,

vs.

THE A. L. SMITH IRON WORKS

No. 229

GEORGE A. OHL & COMPANY, PETITIONER,

vs.

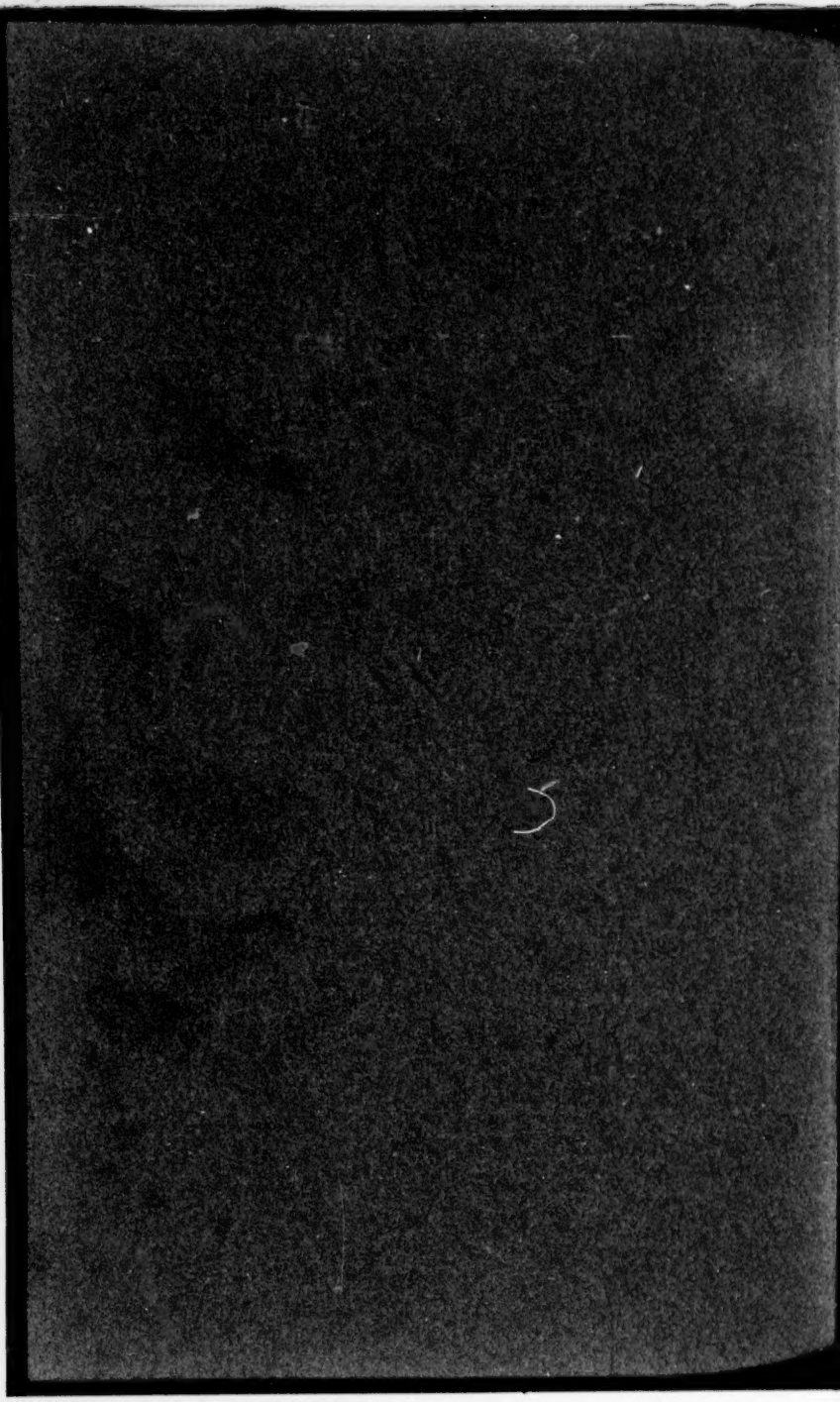
THE A. L. SMITH IRON WORKS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(36,925, 36,926)



(36,925, 36,926)

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1932

No. 228

GEORGE A. OHL & COMPANY, PETITIONER,

vs.

THE A. L. SMITH IRON WORKS

No. 229

GEORGE A. OHL & COMPANY, PETITIONER,

vs.

THE A. L. SMITH IRON WORKS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Original	Print
Proceedings in United States circuit court of appeals, first circuit, case No. 2537	1	1
Caption (omitted in printing)	1	
Record from district court of the United States, District of Massachusetts	1	1
Caption	1	1
Writ of attachment and service	1	1
Declaration	2	2
Exhibit "A"—Promissory note	3	3
Answer	3	3
Plaintiff's motion for specifications	4	3
Minute entries of trial	4	4
Motion for election	4	4
Plaintiff's motion for directed verdict	5	4

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 7, 1932

	Original	Print
Verdict	5	5
Plaintiff's motion for new trial	5	5
Hearing on motion for new trial	6	6
Judgment	6	6
Bill of exceptions	7	7
Answer to defendant's motion for specifications	8	8
Exhibit "A"—Agreement of March 1, 1926, with guarantee attached	11	11
Testimony of Arthur L. Smith	15	14
Exhibit B—Letter, November 24, 1925, Smith to Ohl & Co	17	17
C—Letter, December 4, 1925, Ohl & Co. to Smith	18	18
E—Letter, Ohl & Co. to Smith Iron Works, December 9, 1925	19	19
F—Same, December 14, 1925	19	19
L—Letter, January 12, 1926, Smith Iron Works to Ohl & Co	21	20
O—Letter, January 19, 1926, Ohl & Co. to Smith Iron Works	21	21
Q—Letter, January 30, 1926, Smith Iron Works to Ohl & Co	22	22
R—Letter, Ohl & Co. to Smith Iron Works, February 1, 1926	23	22
S—Same, February 2, 1926	23	23
T—Same	24	23
T-2—Telegram, February 19, 1926, Smith Iron Works to Ohl & Co	24	24
T-3—Telegram, February 19, 1926, Ohl & Co. to Smith Iron Works	24	24
U—Letter, February 27, 1926, Ohl & Co. to Smith Iron Works	27	27
V—Letter, March 2, 1926, Smith Iron Works to Ohl & Co	28	28
W—Letter, March 3, 1926, Ohl & Co. to Smith Iron Works	29	28
CC—Letter, June 25, 1926, Smith Iron Works to Ohl & Co	30	30
DD—Letter, June 28, 1926, Ohl & Co. to Smith Iron Works	31	31
EE—Letter, August 13, 1926, Smith Iron Works to Ohl & Co	32	31
FF—Letter, Ohl & Co. to Smith Iron Works, August 16, 1926	33	33
GG—Same, August 16, 1925	34	34
HH—Same, August 20, 1926	35	34
II—Letter, August 23, 1926, Witte to Shannon	35	35
JJ—Letter, August 25, 1926, Smith Iron Works to Ohl & Co	37	37

	Original	Print
Exhibit KK—Letter, August 26, 1926, Ohl & Co. to Smith Iron Works	38	38
LL—Letter, August 28, 1928, Ohl & Co. to Witte	39	39
MM—Letter, September 3, 1926, Witte to Ohl & Co	41	40
NN—Letter, September 8, 1926, Ohl & Co. to Witte	42	41
OO—Letter, Ohl & Co. to Smith Iron Works, September 14, 1926	43	42
PP—Same, September 22, 1926	44	43
13—Letter, November 9, 1925, Ohl & Co. to Smith	46	45
15—Letter, November 18, 1925, Smith Iron Works to Ohl & Co	51	50
16A—Letter, Smith Iron Works to Ohl & Co., November 25, 1925	54	53
18—Same, January 13, 1926	55	54
Testimony of Raymond H. Wilhelm	58	57
Testimony of Charles J. Hovasse	59	58
Exhibit RR—Statement signed by Hovasse, February 25, 1926	61	60
Testimony of Robert Dunlop	84	83
John E. Carron	85	84
William J. Dubois	92	91
Exhibit KKK—Letter, August 16, 1926, Ohl & Co. to Shannon	92	92
Testimony of George T. Shannon	93	92
Testimony of Arthur L. Townsend	93	93
Exhibit 19—Report of Arthur E. Norton, July 12, 1926	98	98
Exhibit 20—Report of Swett and Townsend	103	102
Testimony of Hiram A. Lerner	109	108
Testimony of Fred Perkins	111	110
Exhibit NNN—Report of Perkins Machine Co.	121	120
Testimony of Jay F. Dailey	123	122
George W. Swett	125	124
Peter Alling	127	126
Frederick J. Wepler	130	130
Fred L. Davis	131	130
Lionell S. Marks	136	136
Frank Kingsland	139	139
Emil W. Kolarsey	143	143
George A. Ohl	145	145
Harold C. Mann	203	207
Charles J. Hovasse (recalled)	205	210
Request for rulings by George A. Ohl Co	207	211
Charge to jury	213	218
Exceptions to charge	217	221

	Original	Print
Order allowing bill of exceptions	219	223
Stipulation as to exhibits	219	224
Bill of exceptions re motion for new trial	221	226
Order allowing bill of exceptions	222	226
Petition for appeal and order allowing same	222	227
Assignments of error	223	227
Bond on appeal (omitted in printing)	223	
Præcipe for transcript of record	224	228
Citation and service (omitted in printing)	225	
Clerk's certificate (omitted in printing)	226	
Proceedings in United States circuit court of appeals, first circuit, case No. 2538	227	229
Caption (omitted in printing)	227	
Record from district court of the United States, District of Massachusetts	227	229
Writ of attachment and service	227	229
Declaration	228	230
Answer	231	233
Defendant's motion for specifications	232	233
Plaintiff's amended answer to motion for specifications, note re	233	235
Minute entries of trial	233	235
Motion for election	234	236
Motion for directed verdict	234	236
Verdict	234	236
Defendant's motion for new trial	235	236
Hearing on motion for new trial	235	237
Judgment	236	238
Bill of exceptions, note re	236	238
Bill of exceptions re motion for new trial, note re	237	239
Stipulation as to exhibits, note re	237	239
Petition for appeal and order allowing same	237	239
Assignment of errors	238	240
Bond on appeal (omitted in printing)	259	
Præcipe for transcript of record	261	262
Citation and acknowledgment of service (omitted in printing)	262	
Certificate of clerk (omitted in printing)	263	
Memorandum re order enlarging time	263	263
Argument and submission (omitted in printing)	264	
Opinion, Morris, J	265	263
Judgment	271	268
Petition for rehearing (omitted in printing)	273	
Order denying rehearing	316	269
Memorandum re stay of mandates	316	269
Clerk's certificate (omitted in printing)	317	
Orders allowing certiorari	318	270

[fols. a-1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 3210, Law Docket

GEORGE A. OHL & Co., Plaintiff,

v.

THE A. L. SMITH IRON WORKS, Defendant

On the eighth day of December, A. D. 1927, a bond to dissolve attachment was filed.

The writ and declaration in this cause was filed in the clerk's office on the eighth day of December, A. D. 1927, and are in the words and figures following:

IN UNITED STATES DISTRICT COURT

WRIT OF ATTACHMENT AND SERVICE

MASSACHUSETTS DISTRICT, ss:

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts or his deputy, Greeting:

We command you to attach the goods or estate of The A. L. Smith Iron Works, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and domi-[fol. 2] ciled in and having an usual place of business in Chelsea, defendant, to the value of thirteen thousand five hundred dollars, and summons said defendant (if it may be found in your district) to appear before our Judge of the District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of March, 1928, then and there in our said court to answer unto George A. Ohl & Co., a corporation duly organized under the laws of the State of New Jersey, and domiciled in and having an usual place of business in Newark, New Jersey, plaintiff, in an action of contract to the damage of

said plaintiff (as it says) the sum of thirteen thousand five hundred dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, the sevente-nth day of November in the year of our Lord one thousand nine hundred and twenty-seven.

James S. Allen, Clerk.

Acceptance of Service on Writ

December 7, 1927.

Due and sufficient service of the within process is hereby ac-epted by and on behalf of the within named defendant.

The A. L. Smith Iron Works, by Martin Witte, its Attorney.

In United States District Court

Plaintiff's Declaration—Filed December 8, 1927

Count 1. The plaintiff says the defendant made and delivered to the plaintiff a promissory note whereof Exhibit A hereto annexed is a copy; that said note was not paid when due but was protested.

Wherefore the defendant owes the plaintiff the amount of said note, with interest thereon, together with protest fees amounting to $2.04.

* * * * * * *

[Memorandum.—Copies of Counts 2 to 12, both inclusive, are here omitted, as they are the same as Count 1; and Exhibits B to L, both inclusive, are here omitted, as they are [fol. 3] the same as Exhibit A, except each note is one month later in date of payment than the preceding.—James S. Allen, Clerk.]

Wherefore the defendant owes the plaintiff the amount of said note with interest thereon.

Lee M. Friedman, by Friedman, Atherton, King & Turner, Its Attorneys.

EXHIBIT A TO DECLARATION

$542.00.

Chelsea, Mass., March 1st, 1926.

Six Months after date we promise to pay to the Order of Geo. A. Ohl & Company Five Hundred Forty-two 00/100 Dollars Payable at Chelsea Trust Company, Chelsea Mass. with interest, Value Received, at 6% per annum.

The A. L. Smith Iron Works, by Arthur L. Smith, Treas.

No.—. Due ——, ——.

Upon the filing of the writ and declaration herein, an order to plead was entered.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed February 29, 1928

And now comes the defendant and for answer denies each and every allegation in the plaintiff's writ and declaration contained as well as each allegation and particular in each and every count of said declaration, as if each of said counts and the allegations thereof were separately and specifically denied.

And further answering the defendant says that if the plaintiff shall establish the notes declared upon in each of the counts contained in the plaintiff's declaration, then each of said notes was given without consideration therefor, and the plaintiff is, therefore, not entitled to recover.

And further answering the defendant says that if the plaintiff shall establish the notes declared upon in each of [fol. 4] the counts contained in the plaintiff's declaration, then the consideration therefor has failed and the plaintiff is, therefore, not entitled to recover.

The Defendant, by Its Attorney, Martin Witte.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR SPECIFICATIONS—Filed May 19, 1928

The plaintiff moves that the defendant be ordered to specify in what particulars the consideration given for the

notes declared on in this action failed as the defendant in the third paragraph of its answer alleges.

Friedman, Atherton, King & Turner, Its Attorneys.

In United States District Court

Minute Entries of Trial

This cause was thence continued from term to term to the March Term, A. D. 1929, when, to wit, April 16, 1929, issue having been joined, a jury was duly empanelled to try the issue, the Honorable James A. Lowell, District Judge, sitting.

Said cause was thereupon set down for hearing and was tried with case No. 3267, Law Docket, The A. L. Smith Iron Works, Plaintiff, v. George A. Ohl & Co., Defendant on the seventeenth, eighteenth, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth and thirtieth days of April, A. D. 1929 and on the first, second, third and seventh days of May, A. D. 1929.

On the said twenty-fifth day of April, A. D. 1929, the following Motion for Election was filed and denied by the court:

In United States District Court

Motion for Election—Filed April 25, 1929

The plaintiff moves that the defendant be required to elect whether it will proceed under its defense in this action or under its cross action being tried herewith.

Friedman, Atherton, King & Turner, Its Attorneys.

[fol. 5] Also, on the same day, the following Motion for Directed Verdict was filed by the plaintiff and denied by the court:

In United States District Court

Motion for Directed Verdict—Filed April 25, 1929

The plaintiff moves that the court herein direct a verdict for the plaintiff.

Friedman, Atherton, King & Turner, Its Attorneys.

IN UNITED STATES DISTRICT COURT

VERDICT—May 7, 1929

The jury find for the defendant.

Fred H. MacDonald, Foreman.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR NEW TRIAL—Filed May 9, 1929

The plaintiff in this action now moves that the verdict of the jury be set aside, and moves that a new trial be granted on the following grounds, to wit:

1. One of the jurors during the trial took notes concerning evidence and testimony and used the same during the deliberations of the jury.

2. One of the jurors took notes during the arguments and used the same during the deliberations of the jury.

3. One or more of the jurors took measurements of exhibits during trial recesses and referred to the same during the deliberations of the jury.

4. The verdict as it concerns the defendant's damage is excessive.

5. The verdict as it concerns the defendant's damage is against the evidence.

[fol. 6] 6. The verdict as it concerns the defendant's damage is against the weight of the evidence.

7. The verdict as it concerns the defendant's damage is against the law and the evidence.

8. The verdict as it concerns the defendant's damage is against the law.

Lee M. Friedman, by Friedman, Atherton, King & Turner, Its Attorneys.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

This cause was thence continued from term to term to the September Term, A. D. 1929, when, to wit, September 30, 1929, a draft bill of exceptions was filed by the plaintiff, within extended time, and assented to.

This cause was thence continued from term to term to the March Term, A. D. 1930, when, to wit, May 14, 1930, said cause was set down for hearing on the aforementioned motion for new trial, the Honorable James A. Lowell, District Judge, sitting, and it was ordered that said motion for new trial be overruled.

At the same term, to wit, May 21, 1930, a draft bill of exceptions concerning plaintiff's motion for new trial was filed and assented to.

The cause was thence continued to the present June Term, A. D. 1930, when, to wit, August 8, 1930, a substituted bill of exceptions on behalf of George A. Ohl & Company, applying also to the aforementioned case No. 3267, Law Docket, is filed and assented to.

On the said eighth day of August, a motion to amend substituted bill of exceptions is filed.

Also on the said eighth day of August, A. D. 1930, a stipulation with reference to exhibits re appeal is filed.

On the twentieth day of August, A. D. 1930, the substitute bill of exceptions, the motion to amend substitute bill of exceptions, and the bill of exceptions concerning plaintiff's motion for new trial are allowed.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Thereupon, to wit, September 8, 1930, it is considered by the court, the Honorable James A. Lowell, District Judge, [fol. 7] sitting, that the said George A. Ohl & Company, plaintiff, take nothing by its said writ, and that the said A. L. Smith Iron Works, defendant, recover of said plaintiff its costs of suit taxed at —.

IN UNITED STATES DISTRICT COURT

No. 3210, Law Docket

GEORGE A. OHL & COMPANY

v.

A. L. SMITH IRON WORKS

No. 3267, Law Docket

A. L. SMITH IRON WORKS

v.

GEORGE A. OHL & COMPANY

Substitute Bill of Exceptions on Behalf of George A. Ohl & Company—Filed August 8, 1930; amended and allowed August 20, 1930

These two actions were tried together by the court with jury. This bill of exceptions is filed by George A. Ohl & Company, physically in the first above named action and by reference in the second.

The A. L. Smith Iron Works is referred to as "Smith" and George A. Ohl & Company as "Ohl." Exhibits referred to by numbers were introduced in evidence by Ohl, and those referred to by letters by Smith. Mr. Friedman tried for Ohl and Mr. Gallagher and Mr. Witte for Smith.

The first action is in contract by Ohl against Smith on twelve promissory notes made payable by Smith to Ohl each for five hundred forty-two dollars ($542) and aggregating six thousand, four hundred and four dollars ($6,404) with protest fees of eight dollars and sixteen cents ($8.16) and interest at six percent (6%) per annum from their respective dates, March 1st, 1926. The writ in that action is dated November 17, 1927, and the answer is one of general denial, want of consideration and failure of consideration.

The second action is brought by Smith against Ohl, upon a written contract of conditional sale, for breach of an express and an implied warranty. The writ in that second action is dated December 7, 1927, and the answer admits the contract and its terms, denies all other allegations and sets

up an examination and acceptance of the merchandise by Smith in satisfaction of all warranties.

[fol. 8] The promissory notes in the first action are those given Ohl by Smith under the written contract in the second action.

The pleadings may be referred to.

Ohl in the first suit on May 14, 1928 moved for specifications under Smith's answer and in the second suit for specifications under Smith's declaration. Smith filed specifications under his declaration in the second suit and the parties agreed that they also be considered as specifications under Smith's answer in the first suit. Those specifications as amended on December 7, 1928 are as follows:

ANSWER TO DEFENDANT'S MOTION FOR SPECIFICATIONS

Now comes the plaintiff in the above-entitled action and, for answer to the defendant's motion for specifications, specifies as follows:

1. In answer to paragraph 1 of the defendant's motion, the plaintiff specifies that the press described in the plaintiff's declaration was set up and installed by the plaintiff between the dates of March 15, 1926 to April 15, 1926, inclusive.

2. In answer to paragraph 2 of the defendant's motion, the plaintiff specifies that the press was first operated by the plaintiff on April 15, 1926.

3. In answer to paragraph 3 of the defendant's motion, the plaintiff specifies that the press from the very beginning rendered unsatisfactory service in the following particulars:

(a) The press stalled.

(b) The fly-wheel assembly operated defectively and improperly.

(c) The clutch that raises and lowers the hammer for adjustment operated defectively and improperly.

(d) The press did not bend sheets of soft steel properly.

(e) The press could not be operated for any length of time without overheating.

4. In answer to paragraph 4 of the defendant's motion, the plaintiff specifies that the press failed to accomplish the

purposes for which it was purchased in that it failed to bend properly sheets of steel as thick as three-eighths of an inch, and in that its material and workmanship was not of the best.

[fol. 9] 5. In answer to paragraph 5 of the defendant's motion, the plaintiff specifies that the press failed to conform to the warranties and specifications referred to in the plaintiff's declaration and as alleged in that declaration on page 2, last paragraph, in that it failed to bend properly sheets of soft steel as thick as three-eighths of an inch, and in that its material and workmanship was not of the best.

6. In answer to paragraph 6 of the defendant's motion, the plaintiff specifies that the press failed properly to bend sheets of soft steel three-eighths of an inch in thickness in that there was a material deflection or bowing after each bending operation, and in that the angles after each bending operation were not perfect.

7. In answer to paragraph 7 of the defendant's motion, the plaintiff specifies that the following parts of said press were not of the best material and workmanship, and were defectively and improperly constructed both with reference to workmanship and material:

(a) The 16-inch bronze bushing in the housing connected with the fly-wheel shaft.

(b) The fly-wheel assembly.

(c) The clutch that raises and lowers the hammer for adjustment.

(d) The housings or stanchions.

8. In answer to paragraph 8 of the defendant's motion, the plaintiff specifies that the material and workmanship was poor,

(a) In the 16-inch bronze bushing,

(b) in the fly-wheel assembly,

(c) in the clutch aforesaid,

(d) in the housings or stanchions.

9. In answer to paragraph 9 of the defendant's motion, the plaintiff specifies that the following are the dates of the notices alleged in the paragraph on page 3 of the plaintiff's declaration:

(a) June 25, 1926;

(b) August 13, 1926;

(c) August 23, 1926;
(d) August 25, 1926;
[fol. 10] (e) September 1, 1926;
(f) September 3, 1926.

10. In answer to paragraph 10 of the defendant's motion, the plaintiff specifies that all of the above notices were written except the one dated September 1, 1926, which was oral.

11. In answer to paragraph 11 of the defendant's motion, the plaintiff specifies in a conversation between the representatives of the plaintiff company and a representative of the defendant company on or about September 1, 1926, at the plant of the plaintiff company, during and after an inspection of the machine in question by these respective representatives, the plaintiff's representatives told the defendant's representative that

(a) The clutch had been causing considerable trouble.
(b) The stringers had not been bending properly.
(c) That the machine was not producing the results for which it was purchased.
(d) That the machine was causing the plaintiff trouble and putting it to considerable expense.
(e) That the plaintiff company had been calling the attention of the defendant company to these difficulties long before the time of this conversation and had requested the defendant company to send some one to the plaintiff's plant to investigate the plaintiff's difficulties with the machine.

12. In answer to paragraph 12 of the defendant's motion, the plaintiff specifies that said oral notice was given to the aforementioned representative of the defendant company, Mr. Kolarsey.

Now comes the plaintiff and moves to amend the answers filed by it to the defendant's motion for specifications as follows:

To amend answer No. 7 by adding the following paragraph:

As a direct result of defective material and improper workmanship and the breaking of the upright stanchion, the plaintiff was compelled to install a repair device which reduced the effective width of the machine by 18 inches and

prevented the plaintiff from bending pieces of steel longer than 10½ feet.

The following is all the testimony material to the issues [fol. 11] presented in this bill of exceptions, and submitted herewith are copies of all the exhibits in evidence material to those issues and which are not set forth at length or in their material parts in the testimony itself.

Counsel for Ohl read the writs and pleadings in each case to the court and jury, including the Smith specifications, stated to the court and jury the agreement as to the specifications being considered as filed by Smith in each suit, made his opening, introduced in evidence the promissory notes declared on as Exhibits 1 to 12 inclusive and rested.

Having opened his case, Smith introduced evidence as follows:

Exhibit A was introduced and read as follows:

EXHIBIT "A"

Newark, N. J., March 9th, 1926.

We hereby guarantee that the 12′ 6″—103,000 lb. Power Press has a capacity as stated in our specifications of said Press, namely 3/8″ soft steel on square Dies the female of which measures 3″ across the corners, and that the material and workmanship are of the best.

Geo. A. Ohl & Company. F. J. Wepler Secretary.
(Seal.)

[Above physically attached to following:]

Memorandum of Agreement made and entered into this first day of March, Nineteen Hundred twenty-six, by and between George A. Ohl & Company, of the City of Newark, County of Essex and State of New Jersey, of the first part, and the A. L. Smith Iron Works, a corporation duly established under the laws of the Commonwealth of Massachusetts and having a usual place of business in Chelsea, in the County of Suffolk and Commonwealth of Massachusetts, of the second part, Witnesseth, that the said party of the first part hath and by these presents doth let unto the said party of the second part—

One (1) Standard 12′ 6″ Power Press or Brake weight about 103,000 lbs. 4″ stroke, opening in each housing 42″ wide x 16″ high, as per Ohl & Co. blueprint #53, for belt [fol. 12] power with motor extras and with one 30 H. P. Fairbanks Morse Motor, 220 volt, 1200 R. P. M. A. C., 3 phase, 60 cycle, with oil compensator but no base rails or pulley.

One (1) Set Unannealed Tool Steel Dies, #1400A/1401A —6′ 2″ long, with four gauges in bottom die and vise recesses in top die. Ohl & Co. drawing #5190A.

One (1) Set Unannealed Tool Steel Dies, #1402A/1403A, 6′ 2″ long, with four gauges in bottom die and vise recesses in top die. Ohl & Co. drawing 5190A.

One (1) Set Unannealed Tool Steel Dies, #1404A/1405A, 6′ 2″ long with four gauges in bottom die and vise recesses in top die. Ohl & Co. drawing 5191A.

One (1) Set Unannealed Tool Steel Dies, #1406A/1407A, 6′ 2″ long, with four gauges in bottom die and vise recesses in top die. Ohl & Co. drawing 5191A.

One (1) Set unannealed Tool Steel Dies, #1408A/1409A, 1409A, 6′ 2″ long, with vise recesses in top die. Ohl & Co. drawing, #5192A.

All for #11 U. S. Standard Gauge Sheet Steel. One (1) Set Machinery Steel Standard Heavy Square Dies, #150a/151A, with tool steel inserts, 12′ 2″ long. Ohl & Co. blueprint #490. 2¼″ across the corners of the female die.

for the term of eighteen (18) months from the date hereof and for the sum of Twelve thousand nine Dollars and sixty-eight cents ($12,009.68), to be paid by the said party of the second part as follows: One thousand ($1000.00) Dollars in cash with order, One Thousand ($1000.00) Dollars when machine is ready for delivery, Two Hundred fifty ($250.00) Dollars in cash with order for dies, (receipt of Two Thousand Two Hundred fifty ($2250.00) Dollars acknowledged herewith), and the balance of Nine Thousand Seven Hundred Fifty Nine Dollars and Sixty-eight cents ($9759.68) by eighteen (18) monthly notes, the first note for Five Hundred Forty-five Dollars and Sixty-eight cents ($545.68) and seventeen (17) notes of Five Hundred Forty-two ($542.00) each, the first note due and payable thirty days from date hereof and the remaining notes thereafter at intervals of [fol. 13] one month each or sooner: said notes, however,

not to be considered as payment until actually paid for in cash, interest to be charged at the rate of six percent (6%) per annum.

The said party of the second part covenants and agrees to pay the said sums of money promptly as they fall due and that the said machine shall be shipped to their place of business, No. 217-233 Everett Ave., Chelsea, Mass., and there held and kept and not removed therefrom without the consent of the party of the first part thereto first had and obtained, and at the expiration or sooner determining of the said term of eighteen (18) months they will quit and surrender the said machines in as good condition as reasonable wear and use will permit.

And it is further agreed by and between the parties to these presents, that if default shall be made in the payment of the first, or any of the above named payments or, if the said party of the second part shall violate any of its covenants, herein, then it shall be lawful for and the said party of the first part may re-enter into possession of said machine, take away, re-possess and enjoy the same as though these presents were not made.

And the said party of the first part doth hereby covenant and agree that the said party of the second part, on paying the above mentioned sums and performing covenants herein, shall and may peacefully and quietly have, hold and enjoy the said machine for the said term.

And the said party of the first part doth hereby covenant and promise and agree to and with the said party of the second part, that if it the said party of the second part shall well and truly keep its covenants herein made, and make no default in the payment of the aforesaid sums, as the same shall become due and payable, and this lease shall not be determined sooner by mutual consent or otherwise, that the said party of the first part will make, execute and deliver to the said party of the second part a bill of sale for said machine, the consideration whereof shall be the amount of the above sums of money or installments of hire, and Five [fol. 14] Dollars additional, payment of said Five Dollars after the expiration of this lease, being the condition precedent to right of purchase.

And the said party of the second part does hereby covenant and agree to keep the said tools in good order and

repair, reasonable wear and tear excepted, and insured against the loss or damage by fire during the continuance of this Lease, in the sum of at Least Nine Thousand Seven Hundred Fifty-nine Dollars and Sixty-eight cents ($9,759.68) in a good company, approved of by the said party of the first part, and in the name and for the benefit of the said party of the first part, and in default thereof the said party of first part may effect such insurance, and the premium so paid for effecting the same shall be paid to him by the said party of the second part.

The said party of the second part shall not assign this lease, or underlet the said personal property without the personal consent of the party of the first part.

It is agreed that the chattels hereinbefore referred to are to remain the property, and subject to the order, of the party of the first part until paid for in full. No payment on account and receipt therefor shall divest such title until said sum has been fully paid.

All part payments made on the said chattels shall be forfeited in case of failure to pay the full amount as herein agreed, and the party of the first part shall have the right to enter, detach, take possession of and remove the said chattels delivered and set up under this contract, and the sum forfeited shall compensate the party of the first part for the erection, depreciation in value, dismounting and removal of said goods.

In Witness whereof, the said parties hereto have hereunto set their hands and seals at Newark, New Jersey, and the day and year first above written.

George A. Ohl & Co. Geo. A. Ohl & Co. George A. Ohl, Jr., Pres. (Seal.) Witness: A. Souter. The A. L. Smith Iron Works, by Arthur L. Smith, Treas. (Seal.) Witness to: George T. Shannon.

[fol. 15] Arthur L. Smith, called by Smith, testified as follows:

"My name is Arthur L. Smith, I live at Sewell Woods Road, Melrose, and am in the iron works business with A. L. Smith Iron Works; have been in business over thirty years, and company's business is at 217 Everett Avenue, Chelsea.

I am its president and treasurer, Mr. Lerner is our vice-president and Mr. Hovasse is master mechanic. The company is engaged in structural steel, ornamental iron business and at times in special work, buying the raw material in lengths for structural and in bars or sheets for ornamental purposes in carload lots shipped to the plant where it is fabricated according to plans, specifications and details. The machine in question relates only to the ornamental department operating on structural steel plates, of all sizes, but in the ornamental department we usually use from 3/8 of an inch thick down. We commonly used from 1/16 inch thick and less up to 5/16. This steel is purchased under thickness or gauge specifications. It is placed on a machine and bent to form stair stringers or the sides of a stair upon which the tread and risers are riveted. The tread and risers are formed on the same machine on different dies of the same material. This is called ornamental work and the company generally installs it in the building where it is to be used under bids and according to plans and specifications. The stringers are usually bent to a 90 degree angle or square. It makes a difference whether the workmanship is straight or bowed. Bowing means that the plate after being bent is not perfectly straight but bowed on the edge; deflection is the bending under pressure of the machine which straightens out when the pressure is removed; both bowing and deflection refer to lack of alignment; spreading means the angle is not perfectly square with the sides out of line.

I think I met Mr. Ohl personally several years before the order in controversy at his plant. Before commencing negotiations with Ohl on this order, I enquired among Boston machinery brokers and received prices. Thereafter I went to see Ohl about my particular requirements for this machine, I should say two or three months before I gave the order. That is not definite because I have not got the date. [fol. 16] I think I met Ohl twice before I gave the order, the first time perhaps a month before, possibly the latter part or middle of November."

The following then took place:

"Q. 1. As near as you can fix it now we will assume it was later than October—could you tell what talk you had?

[Discussion at the bench.]

The Court: I will allow it and save your exception.

Mr. Friedman: Save my exception to all the oral conversation prior to the date of the written contract declared on.

The Court: All right.

Q. 2. Now, will you state if you can the substance of your first talk with Mr. Ohl with reference to this machine?"

The witness then testified: "I visited Ohl's plant, asked to be shown through, asked a lot of questions about what the machines would do and told him what I wanted. The whole conversation naturally hinged on the machine. I cannot remember just what took place. I told Ohl I wanted a 12 foot 6 inch press and he replied, 'I can build it for you.' I told him I wanted a machine strong enough to bend ⅜ plates and he said, 'Yes, I can build one for you that will bend ½ inch.' We were looking at a 10 foot machine and he took me to see some 10 foot machine patterns and said, 'I can make that 12 foot 6 inches long.' I told him we wanted this machine for our Chelsea factory. I asked him whether his machine is as strong as a steel frame machine and he said, 'If I thought the other makes of machine made out of steel were better than mine I would make mine out of steel too.' I had never had any experience in making machines. I told Mr. Ohl what my line was, telling him substantially as described on the witness stand. Ohl said he had built machines all his life and sold them all over the world."

"Q. 3. Now, as a result of that talk, did you talk later with Mr. Ohl? Did you again talk with him about this matter of the machine, of building you a machine?

A. I think the second time I came down to see him was the time I gave him the order.

[fol. 17] Q. 4. And when was that?

A. I should say possibly a week or two weeks later.

Q. 5. Will you tell any talk that you had with him at that time?

A. Terms was one of the talks after I got together with him on the price.

Q. 6. Well, I don't see why you—— Won't you tell, if you will, please, what he said, everything you can remember that you said to him on prices and terms, what the machine was to be used for, and all things.

A. I don't remember." * * *

"Q. 7. Outside of the terms and prices, on which there is no dispute, was there anything further said about the life of the machine or what you wanted it for? * * *

"A. Mr. Ohl made a statement to me, 'If that machine didn't bend three-eights you can have the machine for nothing,' which he never did; that is, he didn't give me the machine for nothing." * * *

Q. 8. About the lifetime of the machine. Anything said of that sort?

A. Well, there was a guarantee that it would do the work.

Q. 9. No. I am asking you what was said by Mr. Ohl, if anything, about how long the machine would last and what work it would do?

A. Well, he prided himself on the fact that he had machines 40 or 50 years old."

I wrote Ohl as follows (Exhibit B):

EXHIBIT B

33 Sewall Woods Rd.,
Melrose, Mass., November 24, 1925.

Geo A. Ohl & Co., 151 Oraton St., Newark, N. J.

GENTLEMEN: As per a quotation made to me on November 9, 1925 for a 12'-6 Power Press of 3/8" capacity, opening in a housing 42" x 16", to this I want to add one (1) motor bracket, one (1) rawhide motor pinion, one (1) combination cut gear flywheel, also the furnishing and mounting of a 30 horse power motor.

The total amount of machine, brackets, and motor is Ten Thousand Seven Hundred and Ninety-Five ($10,795.00) Dollars f. o. b. your siding Railroad.

[fol. 18] Please execute a contract direct with The A. L. Smith Iron Works of Chelsea, Mass., and they will sign same and return to you.

All payments as mentioned in this order are to be made directly by them in the following manner; One Thousand ($1,000.00) Dollars with the signing of the order, One Thousand ($1,000.00) Dollars when you notify them that the machine is loaded on cars, and the balance of Eight Thousand Seven Hundred and Ninety-Five ($8,795.00) Dollars in

eighteen (18) equal notes dated from the date that your machine is loaded on cars and payment monthly thereafter, bearing 6% interest per annum.

The machine is to cover such contract that you usually make out in the event of a machine purchased on instalments.

It is understood that whatever commission is due me I will collect directly from The A. L. Smith Iron Works.

Very truly yours, A. L. Smith.

ALS:SS.

We received from Ohl the following letter (Exhibit C):

EXHIBIT C

Dec. 4, 1925.

A. L. Smith, agent, 33 Sewall Woods Road, Melrose, Mass.

Re: our order # 23557

DEAR SIR: We are enclosing herewith our acknowledgment of your order of the 24th ult., also eighteen thirty-day notes, one for $499.00 and seventeen for $488.00 each, with interest at 6% per annum, and our agreement in triplicate, all of which we have made out to the A. L. Smith Iron Works of Chelsea, Massachsetts, to whom the machine is to be shipped.

Will you please have an officer of the A. L. Smith Iron Works sign these notes and the agreement, which must also be signed by a witness, as indicated by "X" on the last sheet, and on the notes they should also insert the name of their bank unless they wish the notes made payable at their office [fol. 19] in which case their address should be inserted. The notes and agreement will be dated date of shipment of the machine.

These notes and all copies of the agreement should be returned to our office as promptly as possible with a check for $1000.00, which is to be paid on entering of the order.

Thanking you to please give this matter your prompt attention, we are,

Yours very truly, Geo. A. Ohl & Company.

Encl. FJW:TJ.

[It was agreed that the agreement above referred to was a conditional bill of sale or lease, later superseded by that

dated March 1, 1926. Confirmation referred to in the above exhibit is submitted with this bill of exceptions and is marked "Exhibit D".]

The Smith Company did not sign the notes referred to in Exhibit C but sent the $1,000.00 payment referred to.

My company received the following letter (Exhibit E):

EXHIBIT E

December 9th, 1925.

A. L. Smith Iron Works, 217 Everett Ave., Chelsea, Mass.

Our order #23557

GENTLEMEN: Referring to the visit of your Mr. Smith a few days ago, we understand you will send us your check for $1000.00 and return the notes unsigned. Later we will send the notes and agreement at the time the machine is ready for shipment.

Very truly yours Geo. A. Ohl & Company.

GAO. Jr.-S.

Prior to my talks with Ohl, the company had formed metal by using pieces and bolts, as well as by bending it and I desired to get a machine to bend it in one operation. My company received the following letter from Ohl (Exhibit F):

EXHIBIT F

December 14th, 1925.

A. L. Smith Iron Works, 217 Everett Ave., Chelsea, Mass.

GENTLEMEN: As requested by Mr. A. L. Smith, and, in answer to your letter of the 25th ult., we enclose drawings [fol. 20] #5190 to 5193, inclusive, showing dies for forming tread and riser ends, 6′ 2″ long, and, such dies made of unannealed tool steel will cost 20c lb. for the tool steel and $2.00 per hour for the machine work, the approximate prices being as follows:

Dies #1400/1401 will cost approximately	$140.00
Dies #1402/1403 (which are much heavier) will cost aproximately	200.00
Dies #1404/1405 will cost approximately	180.00
Dies #1406/1407 will cost approximately	170.00
Dies #1408/1409 will cost approximately	200.00

The corners will be as sharp as the material will allow. Prices f. o. b. our shop, boxing extra at cost price to us (if any boxing is needed) delivery about two weeks after receipt of order. This will be a separate order from the Power Press, and we will arrange easy terms, say one-quarter amount with order, one-quarter when shipment is made, and balance in ten equal monthly payments or notes with 6% interest, and our regular agreement to be signed. Hoping to receive your order, remain,

Yours very truly, Geo. A. Ohl & Company.

Encls. GAO. Jr.-S.

With this letter the company received drawings of the dies referred to. My company did not furnish Ohl with any drawings as a basis for the drawings referred to in Exhibit F. We sent Ohl the letter Exhibit K (submitted herewith) with reference to the measurements of the foundation the Smith Company was supposed to build for the machine, having received from Ohl a blueprint setting plan. We wrote Ohl (Exhibit L) as follows:

[fol. 21] EXHIBIT L

The A. L. Smith Iron Works, 217-233 Everett Ave., Chelsea, Mass.

January 12, 1926.

Geo. A. Ohl Co., 151 Oraton St., Newark, N. J.

GENTLEMAN: Please proceed to manufacture five (5) sets of dies for our riser, Type A, U. S. standard gauge No. 11, 6′–2″ long, as per full sized drawings (in duplicate enclosed). Also please manufacture a set of dies to bend material at ninety degrees the full length of the machine.

It is of course important that these dies be shipped at the same time with the machine as we are ready to set the machine on its foundation and get it going as soon as it arrives.

Thanking you for your cooperation and courtesies extended to us, we remain.

Very truly yours, The A. L. Smith Iron Works, by H. A. Lerner, Vice-President. S.

HAL:SS. Enc.

The blueprints referred to in Exhibit L show a cross section of "Riser. Type A, U. S. Std. Gauge No. 11, Dies 6′ 2″ long."

Those risers were made under a patented arrangement for No. 11 or 12 gauge sheet steel about ⅛ inch thick which was the steel I referred to that this machine was to bend. My company received a letter from Ohl (Exhibit O) as follows:

EXHIBIT O

January 19, 1926.

A. L. Smith Iron Works, 217–233 Everett Ave., Chelsea, Mass.

Re our order #23687

GENTLEMEN: Replying to yours of the 12th inst., we are enclosing herewith acknowledgment of your order for the five sets of Unannealed Tool Steel Dies for your Stair riser, and also one set machinery steel Standard Heavy Square Dies, #150A/151A, with tool steel inserts, 12′ 2″ long, as [fol. 22] per our blueprint #490, these dies to be 2¼″ across the corners of the female.

We are also enclosing our drawings #5190A, 5191A, 5192A, and #5193A, showing the dies exactly as we will make them, and should you desire any changes, it will be necessary for you to advise us immediately.

As the terms on this order are one-quarter with order, one-quarter when dies are shipped and the balance by ten thirty day notes with interest at 6% per annum, and our regular agreement to be signed, we will thank you to kindly send us your check for $250.00, which we believe is approximately one quarter of the total cost of these dies, as per our letter of December 14th.

Awaiting your further orders, we are

Very truly, Geo. A. Ohl & Company.

ENC/FJW:TJ.

Two sets of dies are referred to in the correspondence. The square on 90 degree die designed and furnished by Ohl was in the machine when the machine broke. The sets of dies consists of a male and female, the male fitting in to the female which rests on the lower bed of the machine as illustrated in Exhibit P (submitted herewith) referred to in

Exhibit O. The measurement of dies across the corners of the female is illustrated in Exhibit P by the dimension 2¼″ appearing on dies No. 150A and No. 151A. I sent Ohl Exhibit Q as follows:

EXHIBIT Q

The A. L. Smith Iron Works 217-233 Everett Ave., Chelsea, Mass.

January 30, 1926.

Geo. A. Ohl Co., 151 Oraton St., Newark, N. J.

Att. Mr. Wepler.

GENTLEMEN: Please advise by return mail how you are getting along on our machine. Have you started putting it together by now? According to the time your foreman gave us we believe you are putting it together now, and if so, when will the machine be ready so that we can arrange [fol. 23] to have our machinist out there to see it in operation, and possibly so see it taken apart.

Very truly yours, The A. L. Smith Iron Works, by Arthur L. Smith, President. S.

ALS:SS.

Mr. Hovasse was the machinist referred to in the letter and ultimately went to the Ohl plant. I received Exhibit R from Ohl as follows:

EXHIBIT R

February 1st, 1926.

A. L. Smith Iron Works, 217 Everett Ave., Chelsea, Mass.

Att. H. A. Lerner. Our order #23557

GENTLEMEN: In answer to yours of the 9th ult., the distance between the front holes on the large Press which is now finished is 13′ 9″, and the same distance between the rear holes. The distance between the holes on the left leg is 7′ 6¾″, and the same distance between the holes on the right leg. Your measurements are off 2″, which we do not

think will do any harm, as the 4" pipe allows that much leeway.

Mr. Smith promised to send circulars and quotations of certain machinery manufacturers, but, as yet, has failed to do so.

Very truly yours, Geo. A. Ohl & Company.

GAO. Jr.-S.

My company later received Exhibit- S and T as follows:

EXHIBIT S

February 2nd, 1926.

The A. L. Smith Iron Works, 217 Everett Ave., Chelsea, Mass.

Att. Arthur L. Smith. Re our order #23557-Press; our order #23687-Dies

GENTLEMEN: In answer to yours of the 30th ult., the Press is now standing and they are reaming out the holes and putting in the large bolts, while three other machinists are finishing up the large shaft with its keyways and gears, fitting keys, etc. We think the shaft will be in its place within a week and the Press should be running within two weeks.

[fol. 24] We still have not received the quotations, circulars, etc., as promised.

Very truly yours, Geo. A. Ohl & Company.

GAO. Jr.-S.

EXHIBIT T

A. L. Smith Iron Works, Everett, Ave., Chelsea, Mass.

Re our order #23557

GENTLEMEN: We expect to have the large Press running sometime next week and will give you several days notice.

We would like to run this Press several days testing out a lot of Dies, which will be a good thing for the machine.

Very truly yours, Geo. A. Ohl & Company.

GAO. Jr.-S.

I sent a telegram (T-2) as follows:

EXHIBIT T-2

1926 Feb. 19, 9:31, Chelsea, Mass.

George A. Ohl and Co., 151 Oraton St., Newark, N. J.:

May we send machinist first of week please wire.

A. L. Smith Iron Works.

and received a telegram in answer (T-3) as follows:

EXHIBIT T-3

Feb. 19th, 1926.

A. L. Smith Iron Works, Chelsea, Mass.:

Yes—Tuesday morning.

Geo. A. Ohl & Co., Newark, N. J.

Charles Hovasse was the machinist referred to in the first telegram.

Hovasse and I went to the plant on Tuesday morning and first met Mr. Ohl. I talked with him and said we came down to see the machine in operation and I believe he said, "Come along. It's ready," or, "It is being about completed." He took us to his plant, and I think he said something to Mr. Hovasse about the oiling. He took us where the machine was being assembled and left us there. We stayed there all the forenoon. I introduced Mr. Hovasse and Mr. Ohl when we first met.

[fol. 25] "A. As my master mechanic—that I wanted him to get all the information as to how to operate the machine and see it taken apart so he can familiarize himself with it and be able to set it up properly."

This machine was to be taken apart, loaded, shipped to Chelsea and set up at our plant under Mr. Hovasse's direction. I told Mr. Ohl my purpose in getting Mr. Hovasse over there was to be sure that he familiarized himself with all the workings of the machine and be able to do the right thing setting it up. It was something we had never handled before. We left the plant about noontime, Hovasse leaving before I did. The machine was all set up except for the

motor platform. They belted machine from the motor on the floor and demonstrated the use of the machine for us, using their own power plant as the motor was not installed on the machine. They made a stair riser and tread on the machine.

"Q. 10. Some work was done on the machine that morning on one-eighth inch material?

A. Yes, sir.

Mr. Friedman: Now, Mr. Gallagher, I am going to ask you not to put words in his mouth. He didn't say that the work was done that morning on a one-eighth inch.

The Court: Proceed, Mr. Gallagher.

Q. 11. Now continue.

A. Tell my own story?

Q. 12. What was done then, not what was said. Just what was done?

A. What was said or done?

Q. 13. What was done?

A. Mr. Ohl's man, the super, I guess, or the man who had charge of putting the machine together, brought a sheet of iron, straight, which would probably be about approximately, well, perhaps 24 or 25 inches wide, and it was either five or six feet long, I don't remember the exact length—anyway, it was long enough according to the die that was made—and the die was six feet two if my memory serves me right in writing that letter—and they made a riser like this. This is only four inches. They made a riser about five to six feet long, riser and tread.

Q. 14. Of what thickness of material?

A. One-eighth.

[fol. 26] Mr. Friedman: I didn't catch whether you said they made a riser or a riser and tread.

The Witness: They made a riser and tread. This (indicating) is called a riser and tread. It is all one, but there is two; there is a riser and a tread.

Mr. Friedman: That is all right. I didn't understand.

Q. 15. Go ahead.

A. When they began to form this material, I don't remember at what stage they had it done, but I know the machine was stuck. Their own man of course adjusted

the dies to form this material and it didn't work very well because it seems that every time the machine came down they noticed then there was quite a deflection in the bed. We called the bottom bed that receives the bottom die the female die.

Q. 16. By 'bed' you mean the lower end of the machine?

A. The lower end of the casting. I think it is a 13-ton piece of casting.

Q. 17. By deflection in the center you mean what?

A. That machine came down and the metal in that big bed bent in the middle. So, the result was that they had to go down several times, perhaps 15 or 20 times, to form that. Of course, I made allowances, they were just trying out the machine. At one time, I can't remember whether it was bending this end or this end in here [indicating], but the machine got struck.

Q. 18. Yes.

A. I know they had to apply. They first tried it by hand with great big bars, to get the machine out of center. When the machine got in center that is where it got stuck so they tried it by hand and didn't succeed, so they attached some power to the pulley, from their own power. I can't remember exactly how. Anyway, to let the work—oh, yes, they brought the crane in. They have a big crane in their plant, big enough to handle all those heavy castings, and there is a man that rides around in that crane at the top. It is a traveling crane. They brought the crane over and attached one of the ends of the hook of the crane, attached it to the flywheel and after a time succeeded in loosening up the machine.

Q. 19. How long did it take them?

[fol. 27] A. I should think they were probably half an hour on that problem. That was quite a problem when the machine got stuck."

The machine was not on a foundation but was resting on timber. I went back to the plant the next day with Hovasse and saw Ohl. I stayed only a little while and left Hovasse there. No tests were made of the machine while I was there that day. I came back to the Chelsea shop and after Hovasse returned I talked with him. I received Exhibit U from Ohl as follows:

EXHIBIT U

February 27th, 1926.

The A. L. Smith Iron Works, 217-233 Everett Ave., Chelsea, Mass.

Re our orders #23557 & #23687

GENTLEMEN: Your 12′ 6″—103,000 lb. Press is now being loaded and the first car, we expect will go forward on Monday, March 1st, and the second car, containing the balance of the Press and the dies, will go forward the following day, as your Mr. Hovasse found the machine and dies satisfactory after testing same and instructed us to make shipment.

We have figured the Dies on order #23687 and they will cost as below:

Unannealed Tool Steel Dies

One Set #1400A/1401A, 6′ 2″ long	$144.40
One Set #1402A/1403A, 6′ 2″ long	$179.63
One Set #1404A/1405A, 6′ 2″ long	$194.33
One Set #1406A/1407A, 6′ 2″ long	$182.53
One Set #1408A/1409A, 6′ 2″ long	$228.50

Machinery Steel Std. Heavy Square Dies

One Set #150A/151A, 12′ 2″ long	$285.29

Making a total of $1214.68 for the dies and $10,795. for the Standard 12′ 6″ Power Press or Brake, weight about 103,000 lbs. with cast iron motor bracket, rawhide motor pinion, combination cut gear flywheel and one-thirty H. P. Fairbanks Morse-1200 R.P.M. motor and compensator but without base rails or pulleys, making total amount of your order $12,-009.68, $2,000. of which has been paid, and as per our agree-[fol. 28] ment you are to sign 18-30 day notes with interest at 6% per annum for the balance. Seventeen notes to be for $556. each and one note for $557.68, all with interest at 6% per annum. You are also to sign a Conditional Lease. We have asked our attorney, Mr. George A. Shannon of #18 Tremont Street, Boston, Mass., to get in touch with you in reference to signing these notes and the Conditional Lease.

He will hand you the bills of lading after lease and notes have been properly executed.

Awaiting your further orders, we remain,

Very truly yours, Geo. A. Ohl & Co.

FJW:GK.

The Hovasse referred to in the letter is our machinist. After I received the letter I made enquiries of Hovasse.

We wrote Ohl (Exhibit V) as follows:

EXHIBIT V

The A. L. Smith Iron Works, 217-233 Everett Ave., Chelsea, Mass.

March 2, 1926.

Geo. A. Ohl & Co., 151 Oraton Street, Newark, N. J.

GENTLEMEN: In reply to your letter of February 27th, we find that you have not given us credit for our check of January 21st—$250.00, making a total paid you to date of $2,250.00 and a total due of $9759.68.

Will you please change your notes to correspond. It would be satisfactory to us if you would give us credit on the first note for this $250.00, or you can divide it up between the seventeen notes.

Very truly yours, The A. L. Smith Iron Works, by N. Nankin.

NN:SS

We received Exhibit W from Ohl as follows:

[fol. 29] EXHIBIT W

March 3rd, 1926.

The A. L. Smith Iron Works, 217-233 Everett Ave., Chelsea, Mass.

Re Our Orders #23557, #23687

GENTLEMEN: We find that you are correct in stating that we did not give you credit for your check for $250.00 which we received on January 22nd, making a total amount paid of $2,250.00, and leaving a balance of $9,759.68 for which you are to sign eighteen thirty-day notes, the first note for $545.68 and seventeen notes for $542.00 each, all with in-

terest at 6% per annum, and you are also to sign a conditional lease or agreement, all of which will be taken care of by our attorney, Mr. George A. Shannon of 18 Tremont St., Boston.

The first car, Erie #19459, was shipped yesterday and the second car, Erie #96805, containing the balance of the press and all of the dies is now loaded and will be taken off our siding this afternoon.

We enclose blueprint and letter of instructions for your machinist's guidance in erecting this Power Press or Brake.

Be sure to have your erecting machinist set up this machine to stand perfectly level and keep it well oiled, oiling at least three or four times a day for the first few weeks so as to allow all bearings to wear smooth.

Your machinist should wipe off all dirt and file off any burrs found on the contact surfaces of the Press pieces, and all nuts, screws, bolts, shafts, etc. should be given a liberal application of oil during the erection.

Be sure to have your electrician wire up the machine to have the flywheel revolve in the direction as indicated on the enclosed blueprint.

We tested out your Press thoroughly before shipment and feel confident that you will be well pleased with the same.

Yours very truly, Geo. A. Ohl & Company.

ENC. FJW:TJ.

[fol. 30] We received Exhibit X (submitted herewith) from Ohl.

Between receipt of Exhibit W of March 3d and signing Exhibit A, dated March 1st, I talked several times with Mr. Shannon. The contract first submitted by him did not have the guarantee attached to it, which is the rider attached to Exhibit A, and Ohl's signature was in typewriting. When the agreement was later offered me it had Ohl's signature in satisfactory form and had the guarantee attached and I then signed the papers. "I think the second time I signed them—either the second or the third time. I think at least it went once back and it might have gone back twice."

Hovasse can better tell when the machine was set up and ready for work and when operations began. I can only

tell about that from the letters. Hovasse can also tell better than I about troubles with machine.

We wrote Ohl (Exhibit CC) as follows:

EXHIBIT CC

The A. L. Smith Iron Works

Office and Works: Chelsea, Mass.

June 25, 1926.

Geo. A. Ohl Co., 151 Oraton St., Newark, N. J.

GENTLEMEN: We are very much concerned over the fact that the power brake which we bought from you is giving us considerable trouble as the fly wheel bearings and disc get very hot, and although we are using a considerable amount of oil we still find it necessary to shut it down several times a day to cool the bearings off.

It is a very serious matter with us and we would like to have you send one of your experts to look the situation over.

Yours very truly, The A. L. Smith Iron Works, by
H. A. Lerner, Vice-President.

HAL:SS.

"Q. 20. Now is the trouble with this bearing something that came under your eye continually or under the eye of Hovasse?

A. Under the eye of Hovasse.

[fol. 31] Q. 21. Then he can tell us more to help us?

A. Of course, he would tell me everything that happened, but he knows more about the mechanical end of it than I do.

Q. 21a. Did you try any three-eighths steel bending or forming in the machine up to this date, June 25?

A. I don't believe so.

Q. 22. So far as you know, you did not?

A. No, sir.

Q. 23. So the trouble experienced up to that date resulted from work on steel of lower dimensions?

A. Lighter material."

We received Exhibit DD from Ohl in answer.

EXHIBIT DD.

June 28th, 1926.

The A. L. Smith Iron Works, Chelsea, Mass.

Att. H. A. Lerner. Our order #23557

GENTLEMEN: In answer to yours of the 25th inst., we have never had any complaint from the many customers having this same type and capacity machine as you.

Any ordinary machinist should be able to take down the flywheel shaft, clean out the bearings with kerosene, clean out the oil holes and the flywheel roller bearing, and then put the parts back in place, using vaseline or a good grade grease in the flywheel roller bearing and a good lard or machinery oil in the other bearings which have phosphor bronze bushings. It seems evident you are using an inferior grade of oil instead of a good lard oil, or, it is possible there was some dirt in the bearing when your machinist put the machine together. We can be of no assistance to you other than what your local machinist can do if he knows his business and is not an automobile mechanic. Please have such a machinist follow our instruction as above and then report to us, as we surely wish to advise and help you and hope your press hand will keep this machine properly oiled with a first class oil.

We await your reply.

Very truly yours, Geo. A. Ohl & Company.

GAO. Jr.-S.

Charles Hovasse was the machinist who supervised this matter. From what he told me I understood he had been a [fol. 32] machinist all his lifetime. He has been with us about fifteen years.

I wrote Ohl (Exhibit EE) as follows:

EXHIBIT EE

The A. L. Smith Iron Works

Office and Works: Chelsea, Mass.

August 13, 1926.

George A. Ohl & Company, 151-161 Oraton Street, Newark, N. J.

GENTLEMEN: We have yours of June 28th, 1926 in response to ours of the 25th of June. We refrained from

writing you since then in the hope that the power press in question would render satisfactory service. We had taken all the precautions suggested in your letter, both before and since its receipt and have been as indulgent as we reasonably could be under the circumstances. Payments have been continued in the hope that the machine would perform as per your guarantee. But it is obvious now that it cannot accomplish what the specifications call for. Moreover we have been to great expense and at some loss by reason of the deficiencies of the press.

While we have obligated ourselves to pay for the machine in accordance with the terms of our contract and have already paid $4,963.68 patiently awaiting better results we cannot believe that we would be required to continue to pay and not have the full benefit of what we are paying for and what you have agreed to sell us.

We have therefore concluded to refrain from making further payments until the press is put into the condition required by the specifications and your guarantee.

If you care to avail yourselves of this simple method by which to preserve friendly relations between us we gladly offer you the opportunity providing that you comply at once and not by merely giving us needless instructions by mail.

We would not be apt to buy a $12,000 machine for the mere sake of making payments to you and abusing the ma-
[fol. 33] chine. We bought a machine in order to facilitate our production.

If, however, our suggestion is not acted upon our only alternative will be to refer the matter to our attorney and have him advise us as to all our rights, whatever they may be. We trust that this may not be necessary. What we want is a workable machine and not controversy if we can avoid it by reasonable concessions.

Yours very truly, The A. L. Smith Iron Works, by Arthur L. Smith, President.

ALS:N.

We received from him the following:

EXHIBIT FF

August 16th, 1926.

The A. L. Smith Iron Works, Chelsea, Mass.

Att. A. L. Smith. Our order #23557

GENTLEMEN: In answer to yours of the 13th inst., we are willing to prove we gave you a first class machine, and we cannot understand what you are trying to get at, but assure you we will stand for no excuses with reference to the payment of this machine shipped you March 1st, 1926.

Your statement in your letter of June 25th that "the flywheel bearings and disc get very hot" shows you are not using the proper oil, and, possible since the shaft is cut, it will always get hot unless you have the shaft trued up or put in a new one. Any machine not properly oiled will cause trouble, which is not up to the manufacturer however.

We have over two thousand of these machines throughout the United States among the different sheet metal workers, many being the same size and type as yours, but we have not received a single complaint from any of them. Last week we received an order from the Shaw-Walker Company for their third press similar to yours, and are also building two more of the same type for other customers, but they would not find fault with us if their flywheel bear-[fol. 34] ings should get hot, and we feel you are simply offering an excuse, as surely any ordinary machinist can take off the flywheel, clean out the dirt with kerosene, and, after everything is in its proper place and nicely cleaned, burrs filed off, use a good machinery oil which will lubricate and not gum.

We have many machines in our shop, but we do not ask the manufacturer to call here free of charge and tell us what any trouble might be in case a flywheel got hot. We know there are many first class machinists in Boston (no automobile mechanic) whom you can call in to examine your Press to prove carelessness has caused the trouble.

With reference to your statement about purchasing a $12,000.00 machine, we assure you we saved you over $3000.00 on the special low quotation given you, and, just

because the flywheel gets hot, is no excuse for you to claim you "cannot facilitate your production." A flywheel getting hot has nothing to do with results, no more than your motor burning out, etc., and no mechanic would accept your excuse.

We insist that you pay your notes or other proceedings shall be taken.

Very truly yours, Geo. A. Ohl & Company.

GAO. Jr.-S.

EXHIBIT GG

August 16th, 1925.

The A. L. Smith Iron Works, Chelsea, Mass.

Att. A. L. Smith. Our order #23559

GENTLEMEN: In addition to our letter of the 16th inst., we call your attention to the fact that the two wooden brakes may require adjusting so that they both grab the brake disc casting immediately and hold same fast without any slipping. If the wood is worn the friction disc will slip and become hot, and the heat will burn the oil in the bearings and in the flywheel.

Very truly yours, Geo. A. Ohl & Company.

GAO. Jr.-S.

During this period Hovasse and others of the company were in closer touch with the work than I was.

[fol. 35] We received from Ohl Exhibit HH as follows:

EXHIBIT HH

August 20th, 1926.

The A. L. Smith Iron Works, Chelsea, Mass.

Att. A. L. Smith

GENTLEMEN: The Boston Engineering Company of Boston reports there is a "play in the shaft caused by the thrust ring being worn, which part has to be renewed."

This proves that you have not properly oiled your Press or the parts would not wear, and no such wear has taken

place in any of the similar Presses sold to our different customers, some of the machines being run over fifteen years.

It seems you require the services of a good mechanic to occasionally look after your Press, which, of course, is not up to us, and the expense of the Boston Engineering Company must be paid by you and not by us. We are shipping two and three Presses every week to different customers, and no such complaint as yours has ever been made, but, they keep their machines properly oiled.

Very truly yours, Geo. A. Ohl & Company.

GAO. Jr.-S.

The Boston Engineering Company there referred to is the Boston concern that was doing some work on the machine at our plant.

Our counsel, Mr. Witte, wrote Mr. Ohl's counsel, Mr. Shannon (Exhibit II), as follows:

EXHIBIT II

August 23, 1926.

George T. Shannon, Esq., 18 Tremont St., Boston, Mass.

DEAR SIR: I am writing with reference to the matter of the A. L. Smith Iron Works in which you are interested on behalf of George A. Ohle and Company. As I said to you this afternoon our chief difficulty is that the machine will not bend ⅜" metal without a material deflection, so that when we do succeed in bending a given piece of ⅜" it re-
[fol. 36] quires a lot of man-power after each operation to recover the metal from deflection.

Your client's contract carried a rider guaranteeing the workmanlike performance of the machine in accordance with the specifications therein enumerated, one of which is the capability of the machine to do what I speak of without the necessity of the after work. If we have to continue to use machine in this condition it will cost us more than if we never had the machine at all; in fact we have been put to considerable loss already. Incidentally I might add that your clients are under the mistaken impression that the only difficulty is with what is known as the clutch which was removed by some men that you sent to our factory the

other day. That is by no means the only and the most serious trouble. What I have described above is the principal difficulty.

My proposal, therefore, is that we will take the clutch back from the place where it now is and restore it to the machine and will then make such changes in the machine as we deem essential to its proper operation in accordance with the specifications, and we will see that that is done at a most economical cost and whatever the bill may be we shall expect your clients to meet it.

We should be glad before we start on the work, which must be done without any serious delay, if one of your client's representatives would call at our plant, to give him an ocular demonstration of just what our difficulties have been and still are. If such a representative calls we hope it will be within the next few days since we cannot lose any more time.

I need not add that so far as you are concerned I deeply appreciate your courtesy and kind treatment.

Yours truly, Martin Witte.

Signed in the absence of Mr. Witte.

"Q. 24. It says it requires a lot of man-power to recover the metal?

A. Yes, to bring it back and straighten it out.

[fol. 37] Q. 25. How is that done where you have that deflection?

A. In most cases we have to keep bringing the machine down several times, perhaps a half a dozen times in some cases, in order to have a bend fairly square, and after that we had to do a lot of straightening, which meant work by hand.

Q. 26. Now, in the case of bending by an efficient die that is working on a machine that is working—is that bending properly done in one operation?

A. Yes, sir.

Q. 27. What you mean is for a ten-foot piece of metal where there is a deflection, you have to put it in the machine again?

A. And again.

Q. 28. And again?

A. And again and again.

Q. 29. Until you get the bend out?

A. Yes. This material wasn't straight and it had to be taken on an iron block and straightened out by hand with hammers.

Q. 30. That causes additional time and expense?

A. Why, straightening would take in some cases four or five times the amount of time it would to bend it, and more too."

Hovasse sent Ohl Exhibit JJ as follows:

EXHIBIT JJ

The A. L. Smith Iron Works

Office and Works: Chelsea, Mass.

August 25, 1926.

Geo. A. Ohl Co., 151 Oraton St., Newark, N. J.

GENTLEMEN: I have read the letter you wrote to Mr. Shannon on the 20th stating that Mr. Smith received the machine after running in your factory, etc., and that because the brass ring was worn was an indication of oil neglect on our part, and that you would not pay the bill.

After trying out the machine for five days and stopping on the job I got the clutch assemble back with only the clutch throw removed and brake badly broken from Boston Engineering. I took the whole thing apart for the first time since assembled at your factory. I found that the bushion 16 in. long in housing #2 was a poor loose fit and turned around. The one bronze roller retainer was broken [fol. 38] in three pieces with only two screws in the other, etc.

Enclosed is a sample of one of five that I found in the roller bearing itself with a lot of chips like sample. This stuff was assembled with bearing without a doubt because even the missing screws in bronze could not get by roller ends.

Mr. Smith being away on his vacation I have taken it upon myself to get this machine running.

I would suggest that you send your manager who I met before. I think that he could see that neglect of someone in your machine shop is the cause of all the trouble. Your

man could take a night train or boat and get here in the morning, stay one hour and see for himself enough to report to you the same afternoon.

This machine will be down Thursday and Friday while I am making repairs on brake, new rings, bushions, etc.

Don't form conclusions—seeing is believing.

Very truly yours, The A. L. Smith Iron Works, by Chas. Hovasse, Master Mechanic.

CH:SS.

We received Exhibit KK from Ohl in answer as follows:

EXHIBIT KK

August 26th, 1926.

A. L. Smith Iron Works, Chelsea, Mass.

Att. Chas. Hovasse

GENTLEMEN: Your letter of the 25th inst. received, and it proves that your machine has not been properly oiled or the brass bushings would not turn in their bearings, as these bushings are driven in with great pressure by two men.

We furnish an American roller bearing which is the best bearing for this purpose, and, if the bronze roller retainer was broken, it again proves it became dry and no oil was used. The small sample of steel sent us proves conclusively that the roller bearing has been running dry, and it is no wonder the bronze flanges were damaged. We have [fol. 39] too many machines of this type throughout the country and none are giving any trouble.

If you do not have the proper foundation under your Press as shown by the blueprint sent you, that is no fault of ours.

We did not agree to keep your machine in repair when your workmen became careless. You accepted the Press at your shop after you had seen it running for almost an entire day and saw samples formed, and you signed an acceptance which we have in our files.

Kindly advise us what damage was done by the Boston Engineering Company as mentioned in the second paragraph of your letter.

Very truly yours, Geo. A. Ohl & Company.

GAO. Jr.-S.

Our counsel, Mr. Witte, received Exhibit LL from Ohl as follows:

EXHIBIT LL

August 28th, 1928.

Martin Witte, 18 Tremont St., Boston, Mass.

Re A. L. Smith Iron Works

DEAR SIR: In answer to yours of the 23rd inst., it is evident you are not acquainted with any of the details of the machine in question.

This Power Press will bend 3/8" material, and we will bend 7/16", depending upon the width of the Dies. Of course, the machine will not bend 3/8" material on narrow dies, which any mechanic would know.

Referring to the deflection, there is no machine of this type made which will not deflect in the center, and we never guaranteed there would be no deflection. This Press was thoroughly tested at our shop before shipment was made, and the master mechanic of above firm was here almost an entire day and saw it running and saw different samples formed and gave us a signed written acceptance which we have in our files, and we do not propose to stand for any excuses from your client who evidently has neglected to properly oil the machine or the bronze bushings would not revolve in their bearings, or the bronze flanges (called roller retainers) [fol. 40] would not chip or show particles of bronze which had been ground off, all due because the bearings were not properly oiled.

Referring to the second paragraph of your letter relative to expense being more than if they never purchased the machine at all, is school boy talk as we have over one thousand of these machines throughout the United States, many in your immediate vicinity, which are giving entire satisfaction, which we can prove.

We do not propose to furnish brains or keep this Press in repairs no more than, when we have accidents through carelessness with the machines in our shop, we would not expect the manufacturer to come and make repairs.

They first complain about the bracket getting hot, and mention nothing of the clutch, which is entirely different, and now they complain of something else. Since they com-

plain about the clutch, please mention what the trouble seems to be, referring to blueprint #1052 showing the different parts of the 25" clutch used on this Press. Your proposal about "taking the clutch back from the place where it now is and restore it to the machine, and you will then make such changes in the machine as you deem essential to its proper operation," is a very peculiar statement, and we do not care to have you or your client design our machines as they are now designed by us after sixty years experience. And we do not propose to have you foster any bills on us as mentioned in the third paragraph of your letter.

As mentioned above, both Mr. Smith and his master mechanic were at our plant several times during the erection of this Press, spending an almost entire day here just before shipment and saw the machine in operation and saw samples formed, after which they gave us a written acceptance. In fact, we would not ship any machine without same being thoroughly tested and found satisfactory, and we are shipping two and three Presses every week.

We feel this is nothing but a hold-up and we will not stand [fol. 41] for it, and, when the notes are due, no doubt the holders of the same will take steps if the notes are not paid.

Very truly yours, Geo. A. Ohl & Company.

GO. Jr.-S.

Mr. Witte answered by Exhibit MM as follows:

EXHIBIT MM

Martin Witte, 18 Tremont Street, Boston, Mass.

September 3, 1926.

George A. Ohle & Company, 151-161 Oraton Street, Newark, *Newark,* N. J.

DEAR SIRS: I have your letter of August 26th with reference to the matter of A. L. Smith Iron Works and I regret very much that you have so little co*d*fidence in my ability to understand the English language.

Notwithstanding the fact that I am but a mere lawyer I have been able, after more or less explanation to grasp the difficulties with the machine in controversy. I have stated my position and that of my client in my letter to Mr. Shan-

non, your attorney, and I am very confident that what I have said there can be substantiated. Having read your correspondence with the Smith Iron Works and having now seen a sample of it myself I am satisfied that further correspondence will be of no avail. I have advised my clients to put the machine in a condition which will at least approximate your written warranty and intend to charge their damage and loss against you.

I repeat, however, that if you desire, instead of writing letters, to do *to* the job yourselves (and I have made it clear to you what the principal trouble is) you may still have that opportunity, unless the Smith Iron Works have already begun the necessary work.

Very truly yours, Martin Witte.

k. dbnr.

I did not sign a written acceptance for the machine.

Mr. Witte received Exhibit NN from Ohl as follows:

[fol. 42] EXHIBIT NN

September 8th, 1926.

Martin Witte, 18 Tremont St., Boston, Mass.

Re A. L. Smith Iron Works

DEAR SIR: Your letter of the 3rd inst. to hand, and it further proves you do not know the first thing about a piece of machinery.

We might advise you that we have had our expert on the job who made an examination and found exactly the cause of the heating after the machine had been running six months. Since you have read the correspondence of the Smith Iron Works and you know all about the matter, we possibly in the future will be able to prove to you there are many items and details you have over-looked.

We wish to be fair in this matter and respect Mr. Smith, but we do not propose to stand for any expenses after our contract was carried out and we furnished a machine exactly as referred to in our circular, blueprint, specification and quotation, as the machine was thoroughly tested and accepted before shipment was made. We did not contract to furnish any repairs, and such repairs sometimes

are necessary, but, of course, the customer pays for such repairs. We would not think of taking steps such as you have toward the manufacturer when something happens to any of our lathes, planes, drills, etc.

We have a written report, evidence, affidavits, correspondence and signed papers, and assure you we will go the limit since you have taken the stand as shown by your letters, and possibly you will be a good expert for your client with reference to what the machine should or should not do, and the writer will have a chance to cross-examine you.

There is no press in the world which will not deflect, and we think you will be a poor witness and your advice has been wrongfully given. We do not believe you know the first thing about the trouble, which we have found out and is not up to us.

[fol. 43] Pardon the sharp language which we feel is necessary from the stand you have taken.

Very truly yours, Geo. A. Ohl & Company.

GAO. Jr.-S.

We received Exhibits OO and PP as follows:

EXHIBIT OO

September 14th, 1926.

The A. L. Smith Iron Works, Chelsea, Mass.

Att. Mr. Smith

GENTLEMEN: We are writing many customers having same type and capacity Power Press as yours and find they are all pleased with the machine and have had no trouble with the flywheel shaft, flywheel roller bearings, phosphor bronze bushings or any other part as claimed by you.

A roller bearing in the housing which we understand is an idea of your master mechanic is not advisable on account of the strain on the rawhide gear, and we would never put in such bearing in the housing after having sixty years' experience of this kind.

We have just received word from the Penna. Railroad Company's Altoona shops that they never had any trouble with their Press of exactly the same type and capacity as yours, which they purchased from us in 1913, and they are easily bending 3/8" soft steel. Their Press only weighed

103,000 lbs. while yours weighs 108,506. In other words, we made you a present of 5506 lbs. casting, which, of course, makes a stronger machine than our standard Press.

We can assure you we are not pleased with the trouble you are causing us which is all due to not properly oiling either the bearings or some other part of the flywheel shaft, and such small repairs were up to you and not us.

We hope it will not be necessary for us to sue you and take away the Press as you surely do not have a leg to stand on, no matter what your Attorney advises you.

Very truly yours, Geo. A. Ohl & Company.

GAO. Jr.-S.

[fol. 44] EXHIBIT PP

September 22nd, 1926.

A. L. Smith Iron Works, Chelsea, Mass.

Att. Mr. Smith

GENTLEMEN: We have just received word from the New York Central Railroad Company that they never had any trouble with their Power Presses or Brakes which are exactly the same type as you purchased, the opening in housing being 42″ the same as yours and capacity 3/8″ soft steel.

From time to time we shall give you such information as above to prove that we gave you a first class machine of first class design, and material and workmanship of the best. The last Press shipped the above firm was October 1st, 1923.

Very truly yours, Geo. A. Ohl & Company.

GAO. Jr.-S.

Mr. H. A. Lerner was in charge of the cost work in the plant and he is the person who can testify with respect to the additional cost involved, as the result of the operation of the machine.

On cross-examination Mr. Smith testified as follows:

"I am general manager of the A. L. Smith Iron Works, know what is going on through reports to me; am generally there early in the morning, going through the plant, meeting and talking with the various department heads. I do not direct the manufacturing. I go outside and get orders."

"X Q. 31. And I understood you to say that you are not a practical machinist?

A. I beg to differ with you on that.

X Q. 32. You are a practical machinist?

A. Yes, sir. No, I wouldn't say a machinist. In my line of work I have started from the bottom and have worked at it since I was 13 years of age."

Before dealing with Ohl we had been building stairs and doing all sorts of structural and ornamental iron works, sending some of it out to be fabricated to various places including the Penn Metal Company in Cambridge. I think we used to buy treads and risers from them. I had been at their plant once or twice where I saw one or more Ohl presses used to produce risers and treads only. I first saw the Ohl [fol. 45] presses there six months, possibly a year, before I bought an Ohl press. I do not think I saw it in operation. I saw an Ohl press, similar to ours, in operation in Brooklyn, New York, before I bought one. We had been shaping material at our plant for years using different methods, using présses but not of the same nature and not doing the kind of work of the press in question.

I started this transaction by asking for a quotation on Ohl presses from a Boston broker and got in touch with Ohl after hearing from the broker. I then went to see Ohl at Newark. I had with me some blueprints showing the kind of work we were trying to do in developing a new tread and riser, one of our patented articles, which I showed to Ohl.

"X Q. 33. I just asked to give the conversation.

A. What do you want me to tell?

X Q. 34. The conversation you had with Mr. Ohl in Newark.

A. I told Mr. Ohl, and I had prints with me, of what I wanted the machine to do. I explained to him how we did some of the work prior to that. I wanted it done by machine so as to cut the cost of our labor down.

X Q. 35. Was anyone with you?

A. No, sir, just Mr. Ohl was there. I believe I had made my views quite clear to Mr. Ohl what I wanted. You stop me if you think I am going too fast.

X Q. 36. All I am asking of you is to just give the conversation between yourself and Mr. Ohl.

A. But you don't expect me very definitely to remember three or four years ago how it happened.

X Q. 37. Give it to me as best you recollect it.

A. All right. I have already said it, I believe, that I had the blueprints with me and showed Mr. Ohl the kind of riser and tread—that laying down there on the floor [indicating], I had a blueprint of that. I had a blueprint of stringer material. I told him how we wanted the work done so as to save cost, how we did some of the work prior to that, and he undertook to tell me he could build a machine for anything I wanted. He took me through his plant and showed me various machines in process. I believe there was some machine in process of construction [fol. 46] then lighter than mine. He showed me patterns and said anything I asked for I can do it. Of course, I can't remember everything that was said in the natural course of the conversation."

I don't know the exact date but it was just prior to placing the order. I don't think I had any communication with Ohl before I went to his office. I believe I telephoned him from New York to find out whether he was going to be in. I wrote on November 24, 1925, to Ohl (Exhibit B) just after I got back from meeting Mr. Ohl personally, for the first time. I was in Newark just prior to November 24th. I do not recall a prior telephone talk with him. I received from Ohl Exhibit 13, as follows:

EXHIBIT 13

November 9th, 1925.

A. L. Smith, agent, 217 Everett Ave., Chelsea, Mass.

DEAR SIR: Referring to your phone conversation with the writer at 9 o'clock a. m. on the 7th inst., as requested we enclose blueprint showing our standard 12′ 6″—103,000 lb. Power Press or Brake with extra opening in housings 42″ x 16″, and shown geared direct to 30 or 35 h. p. motor 1200 r. p. m.

We also enclose blueprint #331 showing foundation plans, and dimension sheet #46, both of which are for our standard 10′ 6″ 92,000-lb. Press, to the length of which you should add 2′ for correct dimensions for the standard 12′ 6″—103,000 lb. Press. The details and widths of both presses are the same.

Also enclose blueprint #53 showing end view of this Press and extra large opening. Also specifications covering both the 10′ 6″—92,000 lb. and 12′ 6″—103,000 lb. Presses.

We also enclose blue print showing Corrugating Dies for corrugating sheets much quicker and better than a Corrugating Roll, which will measure the same in the centre as on the ends, something which cannot be done on a Corrugating Roll. Also blueprints showing our Punching Attachment to be used in our Power Presses which will punch from one to one hundred rolls in one operation. [fol. 47] We also enclose blueprints #490 and #1053 showing some of our standard Forming dies and some of the products formed on the Presses. We will be glad to quote you prices on any of the above after we receive more information. Forming dies are removed from the Press in about two minutes, and the Punching Attachment in less than five minutes.

We quote you the following prices with the understanding you should add on your commission of 5% or 10%, as, under no circumstances, will we pay any commissions as our prices are very low and about cost price to us, as follows:

1 Standard 10′ 6″ Power Press or Brake, weight about 92000 lbs., (last machine weighed 110,114 lbs.) capacity ⅜″ soft steel on square dies the female of which measures 3″ across the corners, arranged for belt power, special reduced price	$9,200.00
1 Standard 12′ 6″ Power Press or Brake, weight about 103,000 lbs., made from above patterns, arranged for belt power, special reduced price	10,300.00

If geared direct our customers generally purchase a 30 or 35 h. p. motor 1200 r. p. m., and the following extras should be added for each machine:

1 Motor bracket	65.00
1 Rawhide motor pinion	60.00
1 Combination cut gear flywheel	60.00

We refer you to the following firms who are using our heavier type Presses:

Osgood Bradley Car Co., Worcester, Mass.
Taunton-New Bedford Copper Co., Taunton, Mass.

N. Y. Central R. R. Co., West Albany, N. Y.
Sexauer-Lempke Co., Long Island City, N. Y.
Dyle & Bacalan, Bordeaux, France.
Tokio Kentetsu Kaisha Co., Tokyo Japan
Pedlar Mfg. Co., Oshawa, Ont.
[fol. 48] Berger Mfg. Co., Canton, Ohio.
Pressed Steel Car Co., Pittsburgh, Pa.
Willis Mfg. Co., Galesburg, Ills.
J. C. McFarland Co., Laporte, Ind.
Triangle Iron Works, New York City.
Penna. R. R. Co., Albany, N. Y. & Altoona, Pa.
Babcock, Wilcox Co., Bayonne, N. J.
Turl Iron & Steel Co., Newburgh, N. Y.
Blawnox Company, Blawnox, Pa.
C. D. Pruden Corp., Baltimore, Md.

and many others.

Prices f. o. b. our siding Erie railroad, delivery from six to eight weeks after receipt of order, and easy terms arranged, say one-quarter amount with order, one-quarter amount when machine is shipped, and balance in twelve equal monthly payments or notes with 6% interest, and our regular agreement to be signed. If necessary, we will carry the account for six additional months under the same conditions.

Hoping to receive your order, remain,

Very truly yours, Geo. A. Ohl & Company.

Encls. GAO. Jr.-S.

217 Everett Avenue, Chelsea, Mass. is my company's address. I received the letter about its date. I saw the blueprints referred to in the letter at the time but I don't know where they are now. The specifications and blueprints Exhibit 14 were received with that letter of November 9th. The blueprints of that exhibit are submitted herewith. Those specifications were as follows:

Specifications

10′ 6″ Power Press or Brake, capacity ⅜″ soft steel, one bend at a time, on dies the female of which measures 3″ across the corners, weight about 90,000 lbs. Also 12′ 6″ Power Press or Brake, weight about 103,000 lbs. (Made from our Standard Patterns.)

[fol. 49] This machine has been built to meet the demand for a machine which will bend the heavier guages of metal with ease and you can also bring out in fine detail, multiple bends which cannot be successfully accomplished in the lighter machines of this class. The machine is double back geared, proportion of gearing 26 to 1. The main or eccentric shaft 8″ in diameter, is a high carbon steel forging, and is driven at both ends by large cut gears, thus preventing all twist of the machine under the heaviest strains and adding greatly to the smooth operation when worked to its fullest capacity. All bearings in the housings are bored from the solid and brushed with phosphor bronze.

The main shaft is supported in six bearings, one in each housing, and the remaining four bearings are so placed on the top leaf that each eccentric operates between two of them, thereby positively preventing the springing of the shaft under the heaviest pressures. The right and left adjusting screws are high carbon steel forging 6″ in diameter and the entire train of gears for the adjusting motion are cut gears the bevel gears and pinions being the steel with their teeth planed from the solid and not milled. This power adjusting motion is protected by our patented friction frog gear marked "B" on enclosed blueprint, which is adjusted that it will just lift the weight of the slide or hammer, and if the operator adjusts the slide down hard on the dies or up to the extreme limit, this gear will slip and no damage will be caused. Stroke of slide or hammer, 4″, the -termediate driving shaft 4″ in diameter, carries a large cut gear of 7″ face, together with two shrouded driving pinions for the main driving gears. The cut gear on this intermediate shaft is driven by a rawhide pinion which is keyed fast to the flywheel shaft 3 7/16″ in diameter, made of hammer forged steel .30 to .40 carbon. This flywheel shaft is supported in two long bearings bushed with phosphor bronze, one bearing in the housing and the other bearing in the large flywheel bracket. The flywheel 42″ [fol. 50] in diameter for an 8″ belt, weighs about 1,800 lbs, and is fitted with a High Duty Roller Bearing having heat-treated nickle steel rollers and hardened steel bushing on the flywheel shaft so that no wear of the shaft can take place where the flywheel revolves. The main driving clutch is 25″ in diameter with its clutch cheeks fitted with hard-

wood inserts, so that it will not "cut" and at the same time carry the full capacity of the machine without slipping.

The friction disc for operating the power adjusting motion is also lined with hardwood and revolves on bronze bushing. Shifting collars for both clutch and friction disc are made of bronze and accurately fitted in their holding slots. The slide or hammer is provided with end gibs, thereby preventing an end motion of this member and making the machine available for gang punching, blanking and other operations which demand a perfectly true guide to this slide.

To make the interchange of dies from any of our presses to this heavier press possible, we have retained same vise centers, and the die holding slots are also of the same width and depth. The openings in the housings measure 42″ wide by 16″ high, so that long pieces can be formed up in successive operations.

Your attention is called to the heavy ribbing provided at the extreme top of the top leaf, thereby giving this piece a strong I-beam construction and placing the metal at the point of greatest tension. Two ribs have been added at the bottom of the top leaf to prevent all deflection sideways from the strains exerted by the eccentrics. A heavy rib has also been added to the top of the hammer, which in combination with the heavy web and additional truss ribs, gives this piece the stiffest possible construction. The bed or bottom piece also has a very heavy rib at the bottom and truss ribs are also provided, guaranteeing a construction which will not spring under the heaviest pressure it is subjected to.

This Press can also be used as a Gang-punch when fitted [fol. 51] with our gang-punching attachment, and as many as 100 holes can be punched at one time.

All gears on the above Power Press or Brake, are cut gears.

Hammer 19 strokes per minute.

Flywheel 500 Revolutions per minute.

Use 35 horse power motor, 1200 R. P. M.

Use an 8″ belt.

The stroke is 4″, the adjustment 6″ and the opening 13½″ between the top of bed and bottom of hammer, when the adjustment is at its highest and the stroke down.

George A. Ohl & Company, Newark, New Jersey.

I was able to read these blueprints and specifications when I received them. I looked through the blueprints and read the specifications. I may have shown the blueprints and specifications to Hovasse. I generally do consult him on the mechanical work when it comes to buying machines, etc., and my recollection is that I did on this occasion, also probably with Mr. Lerner. I think Mr. Lerner and I, and possibly our secretary, went over these specifications carefully before I ever went to Newark. "I looked at the plans and positively read the specifications. The specifications are the most important, because that tells in detail what it will do." I know I saw him prior to those letters that you have read.

I wrote Ohl (Exhibit 15) as follows:

EXHIBIT 15

The A. L. Smith Iron Works

Office and Works: Chelsea, Mass.

November 18, 1925.

George A. Ohl & Co., 151 Oraton Street, Newark, New Jersey.

GENTLEMEN: Please inform us by return mail or wire if Mr. Ohl will be at the Works Monday next, November 23d. I am planning to be at your Works next Monday providing I hear from you that you will be there.

[fol. 52] Should anything come up that might make it impossible for me to be there I will let you know by wire.

Very truly yours, The A. L. Smith Iron Works, by Arthur L. Smith, President.

ALS: SS.

That referred to my second trip I think. On the second trip I closed the deal with him.

"X Q. 38. Now, will you tell us, please, what happened at the time of the second visit?

A. Well, I think at the second visit I closed my final deal with him.

X Q. 39. I didn't ask you that. The conversation between you and Mr. Ohl—that is, you had had these blue-

prints, you had been down there and you had already seen this machine, and you had been back to Boston?

A. I think one of the conversations at that time was this—because I have had some quotations on the steel machine and also from other companies, and I had asked Mr. Ohl whether his machine was as strong as a steel machine. His answer to that was, 'If I thought the steel machine was any better than a cast iron machine, man alive, I would build one.' That was part of the conversation.

X Q. 40. Now, I want to ask this first: At the time you were down there, at that time, did you talk any of the details, or did you have any of the blueprints before you when you gave the order for that machine?

A. I don't believe it. I don't believe I had. After all, it comes to——

Mr. Gallagher: Now, don't. Please wait.

The Witness: All right.

X Q. 41. Well, can you tell us just what was said when you gave him the order, just how you gave him the order? That is, did you tell him you wanted a 103,000-pound press like he had shown you in the blueprint?

A. I didn't state any——

X Q. 42. Can't you answer that?

A. What I told him? I wanted a machine. Is that all right? That would do my work that I contemplated doing. Is that all right?

X Q. 43. Well, I am asking you to tell us what you said? [fol. 53] A. That is what I tried to tell him. Now, will you please put that question again. I don't like to see us misunderstand each other.

X Q. 44. I ask you only to give us the conversation which took place between you and Mr. Ohl on November 23, 1925, when you went there the second time to his factory, after you had gotten all these blueprints, and all this, and when you closed the business with him?

A. Well, I will try to recollect the best I know how. I told him I wanted a machine that will bend our stringers up to three-eighths.

X Q. 45. You told him that the first time, didn't you, Mr. Smith?

Mr. Gallagher: Wait a moment. Pardon me. May the witness complete his answer?

The Court: Yes, go on.

The Witness: I told him I wanted a machine that will bend material without getting it out of shape, or bending it to shape as per our specifications up to three-eighths of an inch, 12 foot long. That was the most sensible thing because the original machine of Mr. Ohl's was only a 10-foot machine, and this was a 12-foot 6 machine. I am very positive of that. In fact, that is where the conversation came in with Mr. Ohl—'Is your machine as good as a steel machine', because I had conversation with him about a steel machine and that is about the same as Mr. Ohl's press. I was preferring to buy a machine nearer home. The other party, by the way, was out west. I impressed on Mr. Ohl the importance of having a machine that would bend my material up to three-eighths of an inch thick and 12 foot long. That was the most important thing. As I have already mentioned, Mr. Ohl's answer was—I don't know about the exact words, "If I thought a steel machine, after being in business so long, if I thought a steel machine was better than a cast iron machine I would build it out of steel myself." Then, of course, we consummated the sale.

Mr. Friedman: Now, if your Honor please, I ask that all be stricken out.

The Court: I will allow it and save your exception.

X Q. 46. Was anything said in that interview between [fol. 54] you and Mr. Ohl about the specifications that he had sent you to Boston on the 9th of November?

A. I believe that the specifications had been mentioned.

X Q. 47. Did you tell him that those specifications were satisfactory?

A. I don't remember whether I said it in those words, but the specification is satisfactory to me if it will do what it says it will."

When I wrote Exhibit B on November 24, 1925, I had been studying the blueprints received with the November 9th letter for several months and I wanted the machine built as shown in those blueprints. When I received the confirmation (Exhibit D) I or Mr. Lerner checked it and did not see anything incorrect in it. I don't believe we make any claim that it is incorrect. I went to Ohl's fac-

tory once or twice while the machine was being built before my visit there with Hovasse.

I think I had a blueprint of my stair riser with me when I first saw Ohl. I may be mistaken and it may be that I gave it to them for the first time after the order was placed. I am not sure.

The witness was shown Exhibit 16A, as follows:

EXHIBIT 16A

The A. L. Smith Iron Works

November 25, 1925.

Geo. A. Ohl Co., 151 Oraton St., Newark, N. J.

GENTLEMEN: We are sending you herewith print of our stair riser. This will be made in No. 10, No. 12, and No. 14 gauge stock. The longest ever made was 6′ although from 3 to 5′ are the common lengths.

You will note that the tread portion is 1½″ deep. You will also note that the portion marked "nose" between points 4 and 5 we have marked off in two widths. We would like to know whether the nosing can be made as narrow as we show it in red pencil and still retain some flat surface on the "nose". It is also important that at point 4 that the bend be sharp but at point 5 it may be rounded. [fol. 55] We would also like to know how many operations it would be necessary to make to cover all the ten bends.

We understand that Mr. Smith has sent you an order on our behalf for a machine and we want to get the ball rolling in preparation for it.

We would thank you for an early reply.

Very truly yours, The A. L. Smith Iron Works, by H. A. Lerner, Vice-President.

HAL:SS. Enc.

The witness then testified:

That letter was signed by our vice-president, Mr. Lerner, and the blueprints there referred to are of our stair riser and tread. The reference to No. 10, 12 and 14 gauge stock means a little less than ⅛ inch thick. We have not made any stair risers longer than 6 feet on these dies, but we

have made them longer than 6 feet but had not at the date of this letter. After I ordered the machine I gave an order for dies, the widest one being 2¼ inches across the corners of the female die. We bought dies from no one else for this machine.

Exhibit 17 (submitted herewith) is the confirmation of the order for dies we received from Ohl.

We sent Ohl Exhibit 18 as follows:

EXHIBIT 18

The A. L. Smith Iron Works, 217-233 Everett Ave.,
Chelsea, Mass.

January 13, 1926.

George A. Ohl Co., 151 Oraton Street, Newark, N. J.

GENTLEMEN: With reference to the ninety degree die that we ordered in our letter yesterday we failed to mention that we would like to have it made as narrow as possible as it will only be expected to bend metal ¼" thick maximum.

Very truly yours, The A. L. Smith Iron Works, by
H. A. Lerner, Vice-President. S.

HAL:SS.

[fol. 56] According to our records we received this machine March 15th and it was all set up by April 15th, 1926, and began to operate the press April 15th. I don't believe we had operated it before. I probably was in the shop on that date. Hovasse and Lerner were there. Carron, one of our employees at that time, had operated such a press and he operated this one when it was first operated April 15th. For quite a time we built risers and treads only on that press.

"X Q. 48. Now, you have said that the press operated unsatisfactorily from the very beginning. Is that the fact?

A. That is the report I used to get from my men.

X Q. 49. No. I asked you whether that is the fact.

A. Yes, it is the fact.

X Q. 50. Did you personally observe anything unsatisfactory in the operation of that press on April 15th when the operations first began?

A. I don't believe I observed it the first day but it was pointed out to me right afterwards.

X Q. 51. Well, do you mean the second day or the third day?

A. Yes, right after the machine was started.

X Q. 52. All right. What was pointed out to you, not what was said but what was pointed out?

A. One bearing was overheating and it was necessary to——

X Q. 53. No.

A. All right. It was overheating.

X Q. 54. Anything else?

A. Some trouble with the clutch.

X Q. 55. Anything else?

A. I can't think of anything just now."

Hovasse called these things to my attention. Several things that didn't seem to work right were called to my attention.

"X Q. 56. All right. Now I ask you to tell us what was called to your attention as being wrong with the machine.

Mr. Gallagher: Besides what he has testified to.

X Q. 57. Besides what he has testified to.

A. After a while, I don't remember exactly, after the machine was started it was called to my attention that it does not bend material in one operation and it doesn't do a perfect job on it.

X Q. 58. All right. Now, let me fix it this way: Let's assume that the machine started April 15. Now, had it been in operation a week or ten days or five days when this that you [fol. 57] now mention was called to your attention?

Mr. Gallagher: The last matter he mentioned?

Mr. Friedman: The last matter he mentioned.

A. I don't think that was called to my attention until the machine was perhaps a couple of months in operation. I am not dead sure of it. I know it was quite a little while afterwards when they began to do some heavy work and found difficulty.

X Q. 59. Can't you look at the records of your company and give us any detailed information?

A. I didn't intend to keep a record of that. I didn't expect I would be asked those questions."

After April 15th I saw the machine in operation whenever I was in the shop and the machine was being operated. Right off it came to my attention that the machine was not satisfactory and I followed it up in a general way.

"That is, I generally make my rounds in the morning to the plant, and I see the various departments, and I talk to the various people there, the men and the foremen, and so forth."

No complaint was made to Ohl until our June 25th letter. We received Ohl's answer (Exhibit DD) to our letter of June 25th (Exhibit CC). I don't think when we got that letter we had the flywheel shaft taken down. I don't think we cleaned out the bearings with kerosene. I don't believe we cleaned out the oil holes and the flywheel roller bearings. I don't think I looked into the question of what grade of grease or oil we were using. I showed the letter to the machinist. Simpson was in our employ at the time. He is superintendent of the whole works. He is there yet. Ships was there then and is there now. He is foreman of the structural department under Simpson.

On redirect examination the witness testified:

I gave the blueprints and specifications of Exhibit 14 some study or thought but made no computations of stresses.

"Q. 60. Did you by these specifications understand you were to get anything suitable for the work you describe?

Mr. Friedman: Wait a minute; I object.

[fol. 58] Mr. Gallagher: The basis has been laid here by this cross-examination.

The Court: I will allow it and save your exceptions.

The Witness: Will you please give me the question?

[The question is read.]

A. Decidedly so, before."

We proposed to make stair risers and treads on the small dies, and stringers out of ⅜" steel running sometimes as long as 15 or 18 feet. The 12' 2" die I ordered of Ohl for stringer work we received, measuring 2¼" across the female end. I left matters of oiling and other suggested matters to cure our troubles to Hovasse.

RAYMOND H. WILHELM, called by Smith, testified as follows:

I live in Newtonville, am a salesman for the Bethlehem Steel Company, and am familiar with steel plate and steel of similar dimensions described by Mr. Smith on the witness stand. Steel plates are sold on gauge thickness or weight per pound basis, and steel sheets invariably on gauge thickness. Three-eighths inch steel varies in thickness. The mills aim to roll no material below 1/100 of an inch below the specified thickness dimension but because of wear on the rollers absolute uniform thickness is not found commercially and a tolerance of 7 percent in weight over or under the exact dimension weight is commercially allowed in any one lot of steel. One particular sheet in the lot may exceed that tolerance by 1⅓ or about 9 percent above or below exact thickness specified, but the lot itself must average within 7 percent. The edges of a plate are measured to give as near exact dimension as mill conditions permit but because of wear on the rollers the center of the plate may be thicker than the edges. On 10 gauge and thinner plates or sheets 5 percent is the tolerance over exact dimension allowed in a lot of steel although individual sheets of that particular lot may vary one from the other as much as 10 percent. That is, one may be 5 percent below exact standard and the other 5 percent above exact standard.

On cross-examination he testified:

On the ⅜ inch steel, one sheet might be 10 percent thicker [fol. 59] than exact standard and one in the same lot 10 percent less than the exact standard, or a variance of 20 percent between the two, but the lot itself must average within 7 percent of the exact standard. Assuming the edges as they come from the roller are uniform, wear on the roller may result in the center of the plate being thicker, with excess weight and excess thickness in the center. If the mechanic does adjust the rollers too close together the same difference between edge and center may result but with a deficit in weight. This variation in thickness is known and recognized in the ornamental and structural iron trade. There is a published statement by The General Association of American Steel Manufacturers giving us what is known as a manufacturers' standard tolerance on

plate material, with which the trade is familiar. In any one sheet of steel or plates material the carbon content, which is one of the factors determining the hardness of steel, may be greater in one of the plates than it is in another. Hardness and softness of a steel plate, because of variance in carbon content, is not uniform throughout the plate.

CHARLES J. HOVASSE, called by Smith, testified as follows:

I live on Clinton Street, Chelsea, Mass., am and have been a machinist for about 25 years, in general repair and in several different plants, working for the Smith Iron Works for about 15 years as a machinist. In March, 1926, I was a master mechanic, having three to eight men under me, in charge of maintenance, in all departments. Since 1925 I have been doing general repair work making small dies, punching and some fabrication of shop tools. In the last part of 1925 my attention was called to the possible purchase of an Ohl machine. I saw the various items of Exhibit 14.

"Q. 1. Did you make any calculation to determine the capacity of a machine of 12 feet, described as 12 feet 6-inch power press, built according to these alleged specifications at that time?

A. I didn't do any figuring of any kind."

I went with Mr. Smith to the Ohl plant in Newark. I can't fix the date. I made only one visit. This was before the ma- [fol. 60] chine was ordered or bought, being there only one or two days, on or about February 25 and 26. My first trip was before the order was given, before November 24. I next went to Ohl's plant the day or two before February 25 with Mr. Smith. I saw Mr. Ohl and was introduced to him as master mechanic. He said: "Come right down stairs and I will show you how to oil it up." The three of us went down stairs together, went to the machine, were told some of the dies were not quite ready. We waited a while and they put in dies for making risers and treads of ⅛ inch stock using a temporary motor fastened to the flooring and belted to the machine, not the motor that finally was attached to the machine. In making this tread and riser the

machine stuck and several men tried to reverse it with a bar, then speeded up the generator to give this motor more power. That failed. They brought an overhead crane and finally reversed the machine. This took about one-half hour. That is all that happened that day. I went back the second following day, I think February 24, to see them dismantle the machine and the foreman told me his idea for me to tackle the proposition with the tools I had. He pointed out to me what to oil and told me there were no hidden or odd places for oiling not visible or without oil holes. I was alone that day and no work was done on the machine, nor anything formed on it. I went again the next day, February 25, alone. I asked them to bend a piece of ⅜ inch.

"A. And they put in three pieces to equal the length of the press and bent them."

Just one bend was made. No one piece 12 feet 6 inches in length of ⅜ steel was bent. Three pieces bent at the same time averaged about 4 feet each, and were bent in one operation. They bent a piece of quarter inch or 5/16 inch stock. That is all. That quarter or 5/16 inch piece was about 12 foot long. I asked to see three-eighths.

"Q. 2. Now, I think you said you asked to see three-eighths inch steel bent?

A. Yes.

Q. 3. And did you ask for a full length?

A. Not in particular.

Q. 4. You didn't. Was there any search made for three-[fol. 61] eighths material about the plant that day?

A. Why, I think they had quite a time in finding it, I believe.

Q. 5. And how did they finally make up this three-eighths that they used?

A. They took a piece and planed it. It was planed on one side to bring it to thickness.

Q. 6. And that is what they used in the machine?

A. Yes, sir."

They started to disassemble the machine while I was there and I watched them. I talked with Mr. Wepler of Ohl's office as I was going out.

"I told him I wouldn't stay to see the whole of the machine taken apart. I didn't consider it necessary. I have relations in New York and I was going there, and, if anybody should call for me, to notify them that is where I was. I said 'Good-day' to him, and he said, 'Just a minute. Will you sign this paper?' I said, 'I have got nothing to sign.' He said, 'It is just to show I have given you full instructions and you have seen the machine running', and I hesitated a minute and he said——

Mr. Friedman: Would you mind giving me that again for my convenience. Will you just give me that?

The Witness: He said, 'It is just to show that I have given you full instructions and you have seen the machine running', and I hesitated a minute and he said, 'My boss is an old crab, and will give me hell if I don't get this thing signed.' So, I accommodated the fellow and signed it.

Q. 7. And was what you signed a paper of which this [indicating] is a copy, a photostatic copy?

A. I should say yes."

The paper referred to was Exhibit RR as follows:

EXHIBIT RR

Geo. A. Ohl & Co., Newark, N. J.

February 25th, 1926.

This is to acknowledge that Mr. Hovasse of A. L. Smith Iron Works of Chelsea, Mass., has tested the 12' 6"-103,000 lb. Power Press or Brake and Dies and found everything satisfactory. Re order #23557.

Charles Hovasse.

Nobody dictated the paper. Mr. Wepler told an elderly [fol. 62] lady there to write out a form and she brought it back to me all typewritten. He handed me a pen and I signed it. Only the 90 degree die was tested out that day. No one piece 12-foot 6 inch lengths of three-eighths steel was put into the press that day. I returned to Chelsea. I didn't report to Mr. Smith what had transpired on February 25. About March 15th we received the machine disassembled, in two carload lots. While at Ohl's plants there was discussion in Ohl's presence concerning a spring or sag in the bed of the machine. In trying the press I noticed

the bed went down considerable. The bed is the part where the dies rest on.

"I asked if I could have a square to see how much it went down, and they said it didn't make any difference, but if I wanted a square they would get me one. And they did. And I noticed it went down about one-sixteenth.

Q. 8. Of an inch?

A. Of an inch.

Q. 9. Yes.

A. And that is all I had to say about it."

[Exhibit SS, submitted herewith, was then introduced in evidence.]

The foundation for the machine we built was deeper than called for by Ohl's specifications because we had to go deeper on account of the soil. It was at least as strong. The bed of the machine is the lower part upon which one die sets. The hammer is the other die and in the operation the hammer with its die comes down on the bed with its die in forming the piece. I attached the machine to the foundation as directed. We started to operate the machine April 15th. There are seasons in the steel forming business which relates to three-eighths thick steel and to lighter steel for risers and treads, the three-eighths being for stringers. When the machine was set up and ready to start I put on the switch, started the motor, got it running, told the operator to put his foot on the lever so I could count the strokes the machine was producing. It was powered with a Fairbanks 30 horse power motor, driven through a clutch and operating through a flywheel, in which there was a further clutch. The flywheel being connected with the hammer through successive gearings. The [fol. 63] machine was started and I started to count the strokes, the number of times the hammer went up and down in a minute. Before the minute was up the machine stopped with a growl. Something got stuck. I looked for the trouble and found the 16-inch bearing had turned around in the housing. This is the bearing in which the clutch shaft assembly revolves. Our motor is connected directly to the machine. This bearing is of phosphor bronze, to take up the wear and allow a free revolving shaft. This bearing is not supposed to revolve but to be

so tight it cannot be moved and the shaft to revolve in the bearing.

"Q. 10. What did you do when you found that condition?

A. I had to strip the whole machine on that end in order to take that out and see what was the trouble.

Q. 11. Did you take it out?

A. I did.

Q. 12. And what did you find the condition of that part of the machine?

A. I found all I had to do was to take out—pull it out with my hand.

Q. 13. That is, instead of being tight and firmly fixed in, you could remove it by hand?

A. Yes, sir.

Q. 14. As you have observed machines are those generally bolted in?

A. Generally bolted in with a heavy bolt.

Q. 15. That makes it immovable?

A. Immovable."

We didn't assemble this bearing. It was in the machine when we got it. I put the bearing back with set screws so it would not turn loose again and I turned eccentric spaces on the top of the bushing and put in these small holes and added two more oil cups on the outside so they would act as a reservoir and the oil would feed down. I reassembled the bearing and oiled it and then ran the machine for a while. A few months later we had trouble again with this bearing. The flywheel bearings and disc referred to in Exhibit CC, letter of June 25, is located right next to this 16-inch bearing.

Q. 16. And were you at that time, even after making the changes in the bearings that you have described and putting in the two oil cups additional, were you still having trouble there?

A. We had.

[fol. 64] Q. 17. And did you have to shut down several times a day to cool it off?

A. We did.

Q. 18. What did you do then as a result of that trouble?

A. We did nothing.

Q. 19. Did you make any repairs whatever, as a result of that trouble, or any investigation?

A. Not me."

August 19th the Boston Engineering Company started to take that part of the machine down and took part of it to their Boston plant. I didn't make any observation of the conditions about that area at that time. After it was reassembled and put back it gave no further trouble. We took the material away from the Boston Engineering — and I cleaned it and put them in working conditions. The brass retainer rings of the roller bearings were broken and there were chips of steel in the bearings. These small particles by their appearance indicated wear to me.

I found a big blow hole in the casting where the 16-inch bushing goes in shown in Exhibit WW (submitted herewith). That weakens the structure. When I received the parts back from the Boston Engineering Company a part of the brake that slows down the machine was broken, two blow holes showing at the break of the brake. I replaced the bearings with two double race ball bearings and thereafter had no trouble with that assembly. From March 15th to June 25th I had no occasion to bend any 3/8 inch steel or any long lengths. The bowing described by Mr. Smith is a bending down in the center of a piece of steel put in the machine for formation which comes out with a sag in the middle, and a deflection is a swinging down of the machine itself. We got the bowing or deflection in the center of the steel as contrasted with the ends. In some cases bending six-foot stair risers or like material that would be especially noticeable though not so much so where it is bent at the end of the machine. The heavy work came in around July.

— —. "Did you have some trouble of some kind later with the machine? Did you have any trouble of any kind with the machine?

A. Nothing beyond the bowing.

[fol. 65] Q. 20. Well, that's something. I asked you if you had any trouble.

A. I thought I had already mentioned it.

Q. 21. Then, I misled you. Did you have some trouble with the machine in addition to this trouble with the shafting and bearing near the clutch and brake?

A. I did.

Q. 22. Name one other trouble.

A. The clutch that raises and lowers the hammer for adjustment.

Q. 23. Yes.

A. Gave a lot of trouble, and finally gave out.
Q. 24. What was the trouble there?
A. Rather than look into the trouble——
Q. 25. No; what was the trouble?
A. It refused to work.
Q. 26. Did you remedy that?
A. I did by adding the separate motor.
Q. 27. That is, you put a separate motor on to accomplish this adjustment. Let's spend a little time on that. That regulates the closeness with which the two knives come together?
A. Yes."

The bed of the machine is supposed to be stationary and not to give. There is no mechanism on the machine for regulating the dies to the thickness of the material you propose to bend. There is an arrangement to regulate the closeness with which the male die should come down to the female die. I didn't change the mechanism of that arrangement but I changed the power that drove it from a clutch or pulley drive to a direct drive from an extra motor working independently of the machine. I had no trouble with this mechanism after I did that work in December, 1926.

"Q. 28. Now you have made some reference to the deflection of the machine or bowing of the material, and I think you said that was caused by the bed swinging down?
A. Yes, sir.
Q. 29. Was that the sinking or sagging of the center of that bed that you noticed down in Newark?
A. It was."

Bowing relates to the work and deflection to the machine. The extent of the bowing of the material we experienced depended on the length of the stock and with the tensity of the steel, being about ¼ inch bow in the center on a 12 foot 6-inch piece. This is unusual in our business and it is not a commercial job of forming to have that much [fol. 66] bowing. A piece so bowed has to be hammered or peened by hand to make it straight, peening meaning continuous hammering at short spaces. We could not bend the material in any one operation without noticeable bowing and a spreading of the metal being formed.

"Q. 30. Could you by more than one operation bend the material in the press without noticeable bowing?

A. No, sir.

Q. 31. Was there any spreading at all in the machine?

A. In the machine?

Q. 32. Yes.

A. Couldn't notice any.

Q. 33. Was there any spreading in the metal being formed?

A. In the metal, yes.

Q. 34. I think you made mention, or perhaps it was Mr. Smith, of three operations on the metal in this machine to form it. What was that?

A. That was on the one-eighth stock.

Q. 35. What did you do with reference to that one-eighth stock?

A. Why, you come down with the dies once keeping them towards the end of the machine.

Q. 36. Yes.

A. I will correct that. You start in the center of the machine and come down once and move it to one end of the machine, and give it a second stroke and slide it to the other end of the machine and give it a third stroke, so it will squeeze and fix into the right shape.

Q. 37. That is, you utilize only the ends of the press?

A. Yes, sir.

Q. 38. Now, at some time after you began to try to bend three-eighths material, did you notice this bowing and deflection?

A. I never bent any three-eighths material.

Q. 39. You didn't bend any of that on it at all?

A. No, sir.

Q. 40. When you bent other material did you notice that deflection?

A. Yes, sir.

Q. 41. And did you make some report of it?

A. Why, yes."

Lard oil is the worst lubricating oil you can use. We used a heavy medium vacuum oil, rated one of the best. My statement in Exhibit JJ that "I took the whole thing apart for the first time since assembled at your factory"

[fol. 67] refers to the whole bearing assembly including the 16-inch bushing that gave us trouble at first.

"Q. 42. And, by the way, you were there when this machine was disassembled by the Boston Engineering Company?

A. In our plant?

Q. 43. Yes.

A. Yes.

Q. 44. And what did you observe, if anything, with regard to the presence or lack of oil, lubrication?

A. Well, it was saturated with oil when it left the plant."

Ohl later sent their representative, Mr. Kolarsy, to our plant about September 1st. Mr. Lerner brought him to the machine shop and introduced him to me. I showed him the machine. He asked whether the machine was set up level. I handed him a level and he put it on the machine, both on the bed and uprights, and said it was perfect. I took him upstairs and showed him the broken parts and told him what I intended to do with the 16-inch bearing—that I was going to put ball bearing in place of the 16-inch bearing. I also showed him how I was going to fix the brake. He said that what I was going to do looked all right. He said that Ohl, after hearing his story, no doubt would see to it that everything would be fixed up all right. He said that the machine could be broken with a piece of paper; that if he came down there after everything was going, he could properly run it so that there would be no deflection. I told him that the stringers were not bent straight. He said he would take that up with Ohl and see if that couldn't be straightened out later. I explained to him what I had done with respect to oiling the machine and the changes I intended to make on the 16-inch bearing "Exhibit UU". No claim was made by Mr. Kolarsy, or anything said to me in substance to the effect that I had not properly oiled the machine. No suggestion was made by Mr. Kolarsy that I should have used grease instead of oil. I was mistaken in saying that Mr. Kolarsy spoke to me about the paper breaking the machine; it was one of Ohl's representatives who came later. He told he that if the dies were properly set, an extra piece of paper put in would break the press. There were no grease cups on the machine when it first

[fol. 68] came to us. There was a considerable difference in the method of using grease and oil as lubrication. When you use oil, you simply fill the oil cup and it runs by gravity; when you use grease, you have to force it in by turning some sort of screw. When Kolarsy was there, he said that the bearing would gradually heat through friction from the brake if there wasn't at least one thirty-second of an inch clearance. This brake is to stop the machine's operation the minute you shut down the machine, and stops the flywheel from continuing to revolve. As a result of my talk with Kolarsy, when I put the whole assembly back I put shims between the bracket and the housing so as to throw the whole bracket out a thirty-second of an inch.

I was at the Ohl plant on three occasions. The first day I was at the Ohl shop in February, Mr. Smith said to Mr. Ohl, in my presence, that he noticed the press went down considerably and asked if that was all right. Mr. Ohl said simply because it was on a temporary foundation and when bolted on its original foundation everything would be all right and not to worry.

After Kolarsy's visit, Professor Townsend and Professor Swett came to the plant, made observations concerning the machine. While they were there we were bending a piece of 3/16ths material and observing the deflection on the machine with a Brown & Sharpe indicator which measures down to about 5/1000ths of an inch. We were using a 90 degree die 12 foot some odd inches long. The bed of the machine bent down 65/1000ths of an inch. The professors wanted to take another reading so I told the operator to turn the material around and make another bend. He did so, and the machine broke on the right-hand housing at two places in the housing or stanchion. Mr. Carron was then operating the machine.

[Six photographs of the machine showing the breaks were introduced here as Exhibits BBB, CCC, DDD, EEE, FFF and GGG and are submitted herewith.]

There is no gauge on the machine for adjusting it to the different thicknesses of metal. The machine is adjusted for the material intended to be bent by the trial and error [fol. 69] method. Assuming we had three/sixteenths metal to work on, we set the dies in this way: "I put in the

dies and raised the hammer more than 3/16ths; we pick up an old scrap of 3/16 stock and put it on the dies and bring it down and try it, then when the machine went up again, we bring down the hammer to the adjustment to what I thought was nearer to the setting. Then I tried again, and if I didn't bring it up to its proper bend, I would repeat the thing until we got just what we wanted for a setting." We make the adjustment constantly and bring the hammer nearer until we get the correct setting.

At the time the machine broke, we had bent the piece of stock on one edge, turned it around and bent it on the opposite and parallel edge and then asked the operator to repeat the stroke on the second edge, making three times that the hammer was brought down. The thickness of the sheet on the side of the first operation was 196½ thousandths of an inch. The opposite side where the second bend was made was 201 thousandths of an inch, 3/16th steel is 187½ thousandths of an inch. The metal that was bent is commercial 3/16ths metal.

After the stanchion broke I repaired it by making steel yokes over the top and putting in large 3-inch bolts to hold it together. So the broken pieces couldn't separate. That did not result in a firm holding so we bored through the bottom bed and the top cross member and put in two steel parallel forgings with pins holding the top and bottom sections of the broken housing together.

After that repair we operated the machine on risers and stringers. We never bent over a ¼ inch thick steel on the 12 foot material. We sometimes took one operation and sometimes two, depending on the tensity of the steel, its hardness and softness and its carbon content. There is a difference in the hardness or softness of this ornamental steel material and there are different grades or hardness, although it is all called soft steel. Because of these repairs we lost some 18 inches in the usable length of the machine. The bars used to repair it narrowed the opening in the [fol. 70] housing so we can't put wide metal in the machine in". Before we got the Ohl press we had no machine like it

On cross-examination:

I was the expert mechanic but had something to do with the manufacturing, as on new machines I am supposed to watch their operation "until a machine is considered run

in". Before we got the Ohl press we had no machine like it at the plant and I had never operated any such machine nor had the Smith Company to my knowledge during the fifteen years or so I have been with them. Before I went to Ohl's plant in Newark around Washington's Birthday I had never seen an Ohl press in operation. Up to the time I saw the blueprints and specifications of Exhibit 14 referred to in Ohl's November 9th letter I had never seen an Ohl machine. I was accustomed to read blueprints and understand them and had experience in making them. I had never seen an Ohl press before February 23, 1926, either in operation or out of operation. I am wrong. I saw the press before at Ohl's plant possibly a month or so before Washington's Birthday and before the order was given before November 24 with Mr. Smith. It was a press practically completed, but not in operation; just being built; I think an 8 foot Ohl press. I saw the Exhibit 14 blueprints and went over them with Mr. Smith before the press was ordered. On February 23 at Ohl's Newark plant I watched the machine in operation, which machine was later sent us. The power unit was not installed and a temporary motor was being used but otherwise the machine was complete. I got there about nine or ten o'clock in the morning and stayed until about four in the afternoon. I saw the machine bend a sample of our stair riser, taking three to four hours to bend it. I went back on the following Thursday about nine o'clock in the morning and stayed until late in the afternoon, probably four or five o'clock, and saw the machine bend three pieces of ⅜ths stock in one operation. These pieces were about six inches wide and about four foot long making about 12 foot of ⅜ths inch soft steel stock, to bend at one time to a 90 degree bend on one of the dies furnished by Ohl and later sent us, taking 15 or 20 minutes to [fol. 71] make the bend. It was bent in one operation. They then bent a piece of ¼ inch or 5/16ths 6 to 8 foot long 90 degree angle, taking 15 to 20 minutes. That piece was bowed when it came out as I observed at the time. I called no one's attention to it and made no remarks about it at the time nor was any criticism of it made in my presence.

"X Q. 45. Now, how about those three pieces that you testified about that were each four feet long? Do you want to change your testimony about those in any way?

A. No, sir.

X Q. 46. Those were all right.

A. I didn't take any particular notice whether they were or not. They were simply bent.

X Q. 47. This occasion was the first time you had ever seen an Ohl press in operation?

A. Yes, sir."

These four pieces were bent in the forenoon on the 90 degree die. I made no inquiry from anybody as to how those dies ought to be tightened, manipulated or arranged. I asked the foreman for instructions about assembling the machine without the equipment they had there and how to use the special dies, that is, I asked what would be the best order to use these five dies in, as I didn't know. The foreman told me the order in which he would use the dies. I can't remember which one he told me to use first. I didn't ask him about how the dies should be placed in the machine. I asked him how to regulate the hammer stroke and noticed that was a very delicate operation requiring a good deal of care, skill and experience. He told me the best thing to do was to take a small piece of scrap of the stock I intended to use and adjust the dies with that, getting it too high at first and gradually coming down until it squeezes into the right shape. I asked him what would happen if a mal-adjustment was made and he said the machine would be liable to stick.

"X Q. 48. Did he tell you, you might break the machine?

A. He did not.

X Q. 49. Didn't you know you would break the machine if you made the wrong adjustment yourself? Didn't you know that yourself?

A. I did, possibly.

[fol. 72] X Q. 50. Possibly. Well, did you know it possibly or did you know it as a fact?

A. No, it was not a fact.

X Q. 51. As an expert machinist, do you know that as a fact?

A. The machine is built to stand this work.

X Q. 52. Do you, as an expert machinist, know as a fact that if you make the wrong adjustment in that hammer, you may possibly break the whole machine?

A. Yes."

I don't think I asked for any other instructions about operating the machine. No information I requested was refused me. They did everything on the machine I asked them to.

I met Mr. Wepler previously in the office. This last day I left the factory through the office, met Wepler in the office, no one had asked me to call at the office and see him, and I had some talk with him. He said to a lady clerk: "Just typewrite a paper for this man to sign that he had seen the machine running", and she came back with this paper, Exhibit RR, which he gave me and which I read. They passed a pen to me and I signed it. I did not ask him to make any changes in the paper but told Wepler I have no right to sign anything. I did not tell him that it was not the truth that the power press and dies had been found satisfactory by me. Before August 25, 1926, it had been called to my attention that Ohl claimed I had seen the press in operation and had found it running satisfactory. I never wrote to Ohl that that statement was not true. The only statement I made to Ohl in that respect was in my letter to them of August 25th.

We received the machine at the factory about March 15th. Soley & Blair, building movers, brought it to our plant and raised the heavy parts of the machine to position on the foundation we had built under my direction, finishing their work about the 23d, when the stanchions were up, the bed in place, the heavy hammer and the heavy cross bars and shafts were up. I did not take the responsibility of directing them how to assemble the heavy portions of the machine. They installed the stanchions, bed, hammer and the cross bars and the main 8-inch shaft. I inspected their installation and examined the different parts before they were put in place.

[fol. 73] We started to operate the machine on April 15th for the first time. Mr. Carron was the man hired to operate that machine. He had been hired some weeks before and helped assemble the machine. I was in charge of the starting and operation of the machine. My previous experience with an Ohl machine was seeing the four pieces bent at the Ohl factory. I started the machine and the hammer moved one or two operations but hadn't run a minute, without doing any work and without dies *it*, when I heard

a growl and the machine stopped. I examined the machine, found I couldn't move the shaft, that it was stuck in some bearing, and found that it was stuck in the 16-inch bearing. I took the thing apart in order to get to that bearing and found that the screws to hold the bearing from turning had sheared off, and the bearing was turning loose. I took the bearing out, tried to turn it on the shaft, found it kind of bound in places, put it back in the machine, drilled screw holes for screws to hold it from turning, cleaned the shaft and put the assembly right back again. I scraped off the sports where it was snug to the shaft.

"X Q. 53. And when you put it back all that was eliminated?

A. Yes, sir.

X Q. 54. And when you put that bearing back that day was it in perfect working condition?

A. No, sir.

X Q. 55. What was wrong with it when you put it back?

A. It wasn't a perfect bearing because the low sports couldn't be brought up to make a bearing. You take off the high sports before the low sports that are beyond, and you couldn't bring them up."

I brought that condition to Smith's attention, told him I had trouble with the bearing and what the trouble was, telling him the workmanship was imperfect and explaining in that way. This was all on April 15th. Short of adding a new bearing there was nothing that could be done to make that bearing right.

"X Q. 56. So that as early as April 15, 1926, you and Mr. Smith both knew the trouble to be that that bearing was imperfect in its construction. That is right, isn't it?

A. Yes, sir.

X Q. 57. It wasn't a question of assembly. It was a question of construction?

A. Yes, sir."

[fol. 74] After we put the bearing back we tried it out. It gave us trouble right along. When we run the machine continuous it always got hot and troubled us after that.

"X Q. 58. Then, it is fair to say that beginning with the fifteenth day of April, right along until you replaced it

and you replaced it in September, that bearing was troublesome?

A. Yes, sir, when run continuous."

In two or three days we had fixed the machine and started it in operation. This was the first time I had ever set dies in that type of machine.

"X Q. 59. Now, will you tell me in your own way in putting the female die on the bed how you determined whether it was level or not?

A. The bed determines the levelness itself. The die has got to be parallel the full length, and when you put the die on the bed there is a tongue that falls down into a slot which holds it in alignment. It can be pushed either way sideways, and lengthwise, depends upon the——"

At that time I didn't know of the peculiarities of the iron that Mr. Wilham testified about. I don't know what die we first put in when we first operated the press. We used 1/8" stock 3 or 4 foot long. I think the press worked all right. I don't know whether it produced perfect material or not. It was apparently satisfactory. Mr. Carron operated the press under my instructions from the information I had from Ohl. I told him to take a piece of scrap of the same thickness and set the dies before trying the work itself. That's all I recall I told him. I watched him off and on for a couple of weeks operating the machine, producing work that was satisfactory to me. He was using the five dies for the risers and treads, possibly the 90-degree die. No other than Carron operated the machine during these two weeks. During those two weeks I observed indications of trouble with the machine. When we put oil in the flywheel bearing there used to be brass dust like small gold dust that would throw from that bearing on the machine. I asked Mr. Lerner to write Ohl and ask them what the construction of the flywheel assembly was. This was some time before May 1st. To my knowledge I don't think there was any com-[fol. 75] plaint about the machine to the Ohl Company before June 25th. This brass dust indication kept going on. I didn't know what the trouble was. This wasn't a serious matter so long as we watched it. After the two weeks period when I observed Carron operating the ma-

chine I made weekly inspections. The machine was operated certain parts of every day. This June 25th letter was the only complaint the company made to Ohl up to that time. That letter refers to the flywheel bearing and disc getting very hot.

"X Q. 60. The flywheel bearing getting hot is something you haven't told us about yet?

A. No, sir.

X Q. 61. When did you first notice the flywheel bearing got hot?

A. Never noticed it to get hot.

X Q. 62. All right. Then that complaint of heating of the flywheel bearing and disc was without justification?

A. The words are wrong.

X Q. 63. I will read this letter, Exhibit CC, June 25:

'We are very much concerned over the fact that the power brake which we bought from you is giving us considerable trouble as the flywheel bearings and disc get very hot although we are using a considerable amount of oil—'

Now, is it a fact that the flywheel bearings and disc were giving no trouble at that time?

A. That is a mistake, an error.

The Court: He wants you to answer Yes or No. Is it a fact they were giving no trouble?

The Witness: Indications of trouble.

X Q. 64. Well, that wasn't the indication that you spoke about, that you pointed out—quite another bearing.

The Court: That was in the flywheel?

The Witness: It gave indication of trouble.

The Court: That was the same wheel?

X Q. 65. Is it a fact that at this time the flywheel bearing and disc got very hot?

A. No, sir.

X Q. 66. That is what I wanted to know. There was no basis for any complaint about the heating, or getting very hot, of the flywheel bearings and disc?

A. That is right."

* * * * * * *

[fol. 76] "A. I don't remember any dates in particular but we have two forms of repair work orders. Any job that appears like a small job of a day or two days is on one form and jobs that are considered as going to run into considerable money are entered on another form. We have to get an order number from the office for that kind of an order.

X Q. 67. Mr. Smith says there was this June 25 report which you said was without foundation, and the next report of anything being complained of was on the 13th of August. Have you got that in mind? You testified a little I think about it.

A. If the work is of no great expense there will be no order that would be here.

Mr. Friedman: Would you mind letting him have his records, Mr. Gallagher?

[Mr. Horvitz hands papers to witness.]

X Q. 68. Now, what is the first date that you can tell us that you did any repair work after, we will say, May?

A. The first expensive job, that is why I would have to put it on this form, would be 9/2/26.

X Q. 69. The twenty-sixth day of August?

A. Yes, sir.

X Q. 70. No, not that.

A. 9/2/26.

X Q. 71. Oh, that is the second day of September?

A. Yes, sir."

Some time before June 25 I examined this machine. After June 25 I just made periodical examinations during which nothing was brought to my attention as to the machine going wrong. After June 25 to September 2d nothing out of the way with regard to this machine was brought to my attention. Shortly after September 2d the Boston Engineering Company came down with four or five men and took the clutch assembly off the machine. I saw them do it. Nothing had come to my attention at that time to indicate any broken bearing.

"A. He took one unit, and all I looked at was the shaft that went in that bearing. That is the only exposed part I could examine.

X Q. 72. The shaft that went into the bearing?

A. That went into that long bearing there [indicating on Exhibit TT].

[fol. 77] X Q. 73. And what did you see with reference to that shaft?

A. It was all right.

X Q. 74. And the bearing was unbroken?

A. Which bearing?

X Q. 75. Did you notice any broken bearing?

A. You couldn't.

X Q. 76. And had anything come to your attention up to that time to indicate any broken bearing?

A. No, sir."

I next saw that part at the Boston Engineering Company's Boston plant. While I was there I saw them trying to pull off the brake pulley, and break it while doing so by trying to drive it off the wrong way against the key. In my judgment it broke because they were taking it off the wrong way and not because of any inherent weakness. They brought the parts back to our plant and I reassembled them after making repairs, bored out the housing where the 16-inch bearing goes and put in ball bearings instead. I did this according to my own ideas without taking it up with Ohl. In putting these parts back I changed dimensions to meet my judgment of what was supposed to be right without consulting Ohl or anybody else. I don't remember when I finished these repairs that began September 2d. From my records they were finished September 7, 1926. I can't tell when the operation of the machine was resumed. I tested it out and the portion I had repaired was operating satisfactorily. So far as I observed, the machine was fit to perform all its functions. I changed the motive power for the hammer adjustment in December, 1926 by installing an independent motor to operate the hammer adjustment. The hammer functioned in the same way. After September 2d I knew there was trouble with the machine on its product. My attention was called to it some time after this repair job. The bowing of long material was called to my attention. I had never handled such long material myself. I don't remember the dates, but a few weeks before the professors came this was called to my atten-

tion and I experimented by putting wedges under the bed and running babbitt metal under the bed to hold it from going down; just poured it in naturally without any strain or stress to that bed. I found that didn't work. Before [fol. 78] I did that there was

"just enough clearance to—well, a small clearance that is all, probably a ¼-inch".

"There was a space between the concrete foundation and the bed of the machine; I was not told by Ohl that the bed was supposed to rest right in and on the concrete; all the rest of the machine was bolted right to the foundation."

The next thing after I tried this experiment was the professors' visit. Carron was then operating the machine. The first time the professors came they just took measurements. They came back the second time and we put on the indicator to test the machine. The indication as shown by the indicator could be observed with the eye. Professors Swett and Townsend and I gave suggestions as to operating the machine. We put in that small rod that is here in the court room of 3/16-inch stock. One edge of that rod where it is bent is bowed. The other edge where it is bent looks pretty good. Both ends were made with the same dies and practically at the same time. On this particular piece of metal the edges are of different thicknesses. I had never noticed that bowing in products from this machine before June 25, nor before September 2d. I first noticed it some time after September 2d and before the professors came. We probably used long lengths before this time but the deflection may not have come to my attention.

"X Q. 77. That is, your attention was never called to any bowing or that they were using this machine for a long length of heavy material until October?

A. My attention wasn't brought to that until some two weeks before the professors came.

X Q. 78. Now, when you had your attention called to that machine, the only trouble with it at that time was the bowing, wasn't it?

Mr. Gallagher: What time is this? Which time?

X Q. 79. In October?

A. I would say. Yes.

X Q. 80. Everything else was working satisfactorily and properly?

A. Yes, sir.

X Q. 81. And the bowing was the only difficulty?

A. And the spreading also, all taken into consideration. [fol. 79] X Q. 82. Now, there was no spreading on this? [Referring to the piece in the machine when it broke.]

A. There may not be on that particular piece.

X Q. 83. Now, would you be willing to give us your opinion now what is the bowing in figures on that piece that we see here?

A. In figures?

X Q. 84. Yes.

A. I wouldn't attempt it.

X Q. 85. Can't you give us any idea? Couldn't you measure it?

A. Measure that?

X Q. 86. Yes, the extent of the bowing.

A. I won't say there is any in that.

X Q. 87. You wouldn't. I see.

A. There is bowing.

X Q. 88. Well——

A. I will take that back.

X Q. 89. All right. Take it back if you want to. What is your answer now?

A. On the bowing there was a difference of the space that was under that string when you looked at it. That was the bowing of that piece, the difference from the string down to the steel, that space.

X Q. 90. There was very little of it, wasn't there?

A. I am not disputing the amount.

X Q. 91. You say there was bowing sufficient in that piece to make it imperfect?

A. Yes, sir.

X Q. 92. That is, you call that piece imperfect because there was, as you think, in certain places, some space between the string and the steel?

A. Yes.

X Q. 93. Have you had any experience with this kind of material?

A. No, sir.

I noticed that this kind of steel varies in that certain places in a sheet may be harder than other places. I learned that since the arguments about this machine came up. That fact would to a certain extent vary the effect of the hammer on the steel. This piece in the courtroom that I have spoken about was the one the professors were experimenting with when the machine broke. One bend had been made; the second bend had been made and a repeat stroke was made on the second bend when the machine broke. I would not say whether or not the hammer was meeting with any re- [fol. 80] sistance in making that second stroke on the second bend.

"A. There are two operations to the bending of that, or two distinct functions that took place. The first is the stock starts to bend, and the second function is that it has to be set; simply bending a piece don't necessarily hold it in that shape. It has to be squeezed to that shape."

There were no changes in the adjustment while making these three bends. Up to this time I had observed nothing wrong with the stanchions which then broke. Nothing wrong about them came to my attention. I did not consult Ohl about making the repairs on this break. I first put in yokes and bolts, found that unsatisfactory and then put on upright slabs. I knew by doing so I would cut off the usable length of the machine. I took that matter up with Mr. Smith. He said, if possible, to repair it so as not to lose any length. I never tried to bend any 3/8ths material on this machine. I saw them bend 3/8ths on it at the Ohl plant but since then have never seen any 3/8ths tried on the machine. I have never seen a 3" female die used on the machine. We haven't one at our shop. Our largest is supposed to be 2¼" but measures 2 and 5/16ths. There is no indicator or gauge on the machine to determine the setting for any specified thickness of material. The setting of the hammer depends on the judgment of the operator.

"X Q. 94. That is a very important thing in operating this machine, isn't it, the regulation of the stroke of the hammer? That requires a nice adjustment, doesn't it?

A. That is all there is to the running of it.

X Q. 95. There is a good deal of skill required?

A. Yes, sir."

I went to Ohl's plant with Smith before the machine was ordered and went there again when the machine was ready. All of the parts of the machine were at our plant by March 12, 1926. The June 25th letter statement, "the power brake is giving us considerable trouble as the flywheel bearings and disk were getting very hot," was an error between the man who took the order and me. Nothing of that sort was happening. I was having no heating trouble with that [fol. 81] bearing at all. The trouble we were then having was on the 16" bearing. It was in the 16" bearing we located the trouble when we first ran the machine on April 15th. When we saw the machine in operation at Newark this shaft and bearing were apparently running right. They were giving no trouble. When we received the machine the bearing was installed in the housing, the shaft was separate and I installed the shaft in the bearing. It is possible that if the shaft when installed was not properly lined up it would tend to bind in some part of the bearing. If the shaft and bearing bound there would be a tendency to turn the bearing. That is, would shear the screws off. If the shaft wasn't properly lubricated in time it might heat up and bind, tending to shear off the screws. If when installed the shaft was not thoroughly cleaned of dirt and grit picked up in transit and the bearing was not thoroughly cleaned, it might bind and shear off the screws. Any one of these three conditions would be an adequate explanation for what happened when the machine was first run. When I saw it running in Newark I didn't notice any defect.

On redirect examination:

I cleaned the shaft and bearing before I set them up and oiled or greased them. After I put the bearing back I put the shaft in in the same way and had no trouble.

"Q. 96. If lack of alignment had been the case, would you have had some trouble afterwards?

A. Yes, sir.

Q. 97. And you set it up according to their specifications, didn't you?

A. Yes, sir."

The blueprint of the Ohl Company showing the distance between the foundation bolts on the machine was 13 feet 8 inches across. The foundation as I built it, as shown by

Exhibit K, was 13 feet 7 inches across; as Ohl Company built the machine, this distance was 13 feet 9 inches across. The distance crosswise between the bolts, as shown on the blueprint, was 7 feet 7 inches and that was precisely the distance on the foundation that I built. The distance in the machine that was built was 7 feet 6¾ inches. There is no foundation support shown in the blueprint Exhibit 13. There was no foundation support under the bed in Newark; [fol. 82] and when Kolarsy came to see that machine in our shop in October, he made no criticism of the way it was set up on its bed. The Z bend that was in the machine when the professors were there is not a typical bend for stringer work—stringers are bent channel shape. If you take a piece of steel and bend it one way and get a little bowing, then you put it in the machine and make another bend the other way; the second bend takes the bow out of the first bend and retards the bow in the second bend. If you bend a channel iron, you have a tendency to increase the bowing.

The machine as we are using it now for steel lengths still bows. I discussed this defective workmanship and bowing of material or deflection of the machine with Mr. Smith and Mr. Lerner.

"Q. 98. And did you learn from either one of them at some time that either of them had taken the matter up with counsel?

Mr. Friedman: Wait a minute. I object to that.
The Court: All right.
The Witness: I did.

Q. 99. Now, for the purpose of refreshing your recollection, if in doubt, I will show you Exhibit II and ask you whether, because of the date of that letter and the portion I am reading, you are satisfied that you learned of that bowing at some time, and if so, does that help you to fix the time?

Mr. Friedman: I object to that.
The Court: I will allow it and save your exception.

A. It must have been before this.
Q. 100. And by 'before this' you mean what date?
A. Before the month of August."

The June 25th letter was inaccurate in referring to the flywheel bearing. It was the 16" bearing that was giving trouble, that is, the flywheel shaft bearing.

"Q. 101. Now in Exhibit DD Mr. Ohl says, 'An ordinary machinist should be able to take down the flywheel shaft.' Is that the flywheel shaft upon which the flywheel bearings and connections with it are mounted?

A. Yes, sir.

Q. 102. And I think you said to Mr. Friedman when you [fol. 83] read Exhibit DD you learned that Mr. Ohl had understood your complaint?

A. Yes, sir."

"Q. 103. Now, you can understand how anybody reading Exhibit CC, anyone having any mechanical learning, could have understood that trouble was limited to the flywheel bearings and not transmitted through the shaft to the disc?

Mr. Friedman: Just a minute.

Mr. Gallagher: That is the whole point of this examination, that this letter was misleading, your Honor.

The Court: I will allow it and save your exceptions.

The Witness: What is the question?

[The question is read.]

A. No."

"Q. 104. As a matter of fact, does that bending itself take any great stress in that operation?

A. The first bending, in my estimation, don't take as much as setting the stock. You can bend a piece of stock and let go and it will go back. You have got to put in a form to stay there.

Q. 105. And take that spring out of it?

A. Yes, sir."

A piece of metal that was bent for me at Newark was bowed when it came out. I had Ohl send that piece of metal to me with the machine. I didn't save it. The piece of 3/8ths material bent at Newark was not bent to a 90-degree angle. I didn't examine the piece at the time close enough to observe that it was with a copper back as I now see it is.

At the time I wrote Exhibit JJ, letter of August 25th to Ohl, I knew all about the matter referred to in that letter.

As a result of it, Kolarsy came to our shop on September 1st.

The copper back steel that was bent at Newark is not the kind of steel we get for stringers.

On recross-examination:

"X Q. 106. Will you mark this Exhibit TT——

The Court: Don't mark it yet until I pass on it.

X Q. 107. —in ink to show the outline of the place where the bearing in the letter of June 25, Exhibit CC, is located?

[fol. 84] The Court: That I refuse because the letter has been shown to be in error. I will save your exception."

Under Ohl's plans and specifications the bed of the machine should have a clearance between it and the foundation. When the professors came I had plugged up that clearance. I have no records to show when I did it.

I couldn't say whether or not the space between the bed of the machine and the cement foundation was plugged up with babbitt on the day the machine broke.

Ohl's representative, Kolarsy, was at the plant on September 1st and all the changes made in the bearings and housing were made after September 2d except those on the 16″ bearing made the first day we used the machine.

Robert Dunlop, called by the defendant, testified:

I am a machinist with the Boston Engineering Company, with twenty years' practical experience. I went to the Smith plant in August, 1926. I did nothing the first day. The second day we took the clutch assembly out which the next day we took to our shop.

"Q. 1. Go through from the beginning to the end with what you did.

A. First of all we had to clean out——

Q. 2. Did you take it apart? Did you take the clutch apart?

A. Yes, sir."

We found it well lubricated. Inside the flywheel, up underneath, there seemed to be brass and oil combined in there where it would fly out.

When we took it apart the brake pulley fell apart. There were a lot of flaws in it.

On cross-examination:

I can't say whether I had ever worked on disassembling a clutch assembly on a machine of that type before. I was foreman in charge of the job. I think Hovasse was present when this brake pulley broke. It was on tight and we used drawer bolts to take it off, one on each side. The next day Hovasse told me I had been driving it off the wrong way and against the key. I couldn't tell you whether or not I was trying to pull it off the wrong way. It was keyed to the [fol. 85] shaft. It broke while we were pulling it off the shaft. We found an accumulation of paste composed of oil and dust that it took us a couple of hours to clean out. Most of it was under the flywheel face. The brass filings were in the end of the face. That meant something had been cutting in that assembly and when they oiled it the oil would wash it out.

On redirect examination:

When we took it apart some of the retainer rings fell out due to friction and being worn out.

JOHN E. CARRON, called by the defendant, testified:

I am a brake operator, was employed by Smith to run the machine in controversy; had had three years' previous experience with a power brake for Osgood-Bradley Company of Worcester, who builds steel cars. I operated a 10-foot Ohl press of the same dimensions of this one except for the width between the housings. Smith hired me February 23, 1926. I helped assemble the machine. We tried out the machine for the first time the middle of April. Hovasse and I were there. Hovasse started the machine and there was kind of a rumble and he stopped. We didn't bend anything that day. Hovasse took the bearing out. That was the 16-inch bearing, the clutch assembly shaft

bearing. He found the bolts sheared off and he said something about the bearing being stuck in there. A few days later when the machine was put together again I did some work on it. I generally put the female die in the slot in the bed of the machine, put the male die in the female die, letting the hammer down gradually until we can clamp the male die to the hammer and then raise the hammer. There is no gauge on the machine for thickness of material so we adjust the hammer by estimate, allowing plenty of clearance. The hammer comes down gradually and we can stop it at any point. This is called the trial and error method of adjustment. We then take a piece of scrap of the same thickness as the metal to be bent, put it on the dies, bring the hammer down one revolution and observe if the scrap piece is bent to the right angle or not. If it isn't we lower the hammer adjustment until we think we [fol. 86] have got the right angle. If we are bending a 90-degree angle we take an ordinary square and test the angle. If the adjustment is right we start in with the regular work.

When we started on this machine we bent up risers for several weeks.

One revolution of the machine accomplishes both a downward and upward motion and the machine made about 20 revolutions per minute. There is no way to increase this speed.

"Q. 1. During that period of several weeks that you were working, what if anything did you notice that was out or wrong about the machine—if anything?

A. Well, I didn't notice anything out of the ordinary outside of there seemed to be a lot of deflection in the bed, but on short pieces, like the risers that we done, why it didn't seem to do any harm.

Q. 2. What about the shaft, if anything?

A. Oh, we did have some trouble with the flywheel shaft bearing.

Q. 3. What sort of trouble?

A. Heating.

Q. 4. And when if at all did you notice this heating—that is, during what sort of process of the machine?

A. At times we run the machine continuously. We call it feeding, and after it ran for an hour or an hour and a half or perhaps two hours it would get pretty hot."

We oiled the machine four or five times a day and those bearings that heated up we oiled more than that. There were a couple of dozen places for oil.

There was no places that required or received grease. Later on an attachment was put on to put in grease with a gun. As we went on, we kept adding grease and oil cups. That heating I spoke about didn't stop until they put in the roller bearings. We had no trouble after that. When I noticed these heatings I generally stopped the machine and told Hovasse. Frequently we stopped the machine, allowed it to cool and then started it up. That happened quite frequent before the last time we put that shaft back.

Quite a few months after we started to run the machine we started to bend long work, around 12 foot long. We [fol. 87] bent 20 foot but that is unusual length. After bending the first stringer I noticed there was quite a bow in it. I found the ends were square and the center bowed out.

"Q. 5. Now, what did you have to do to get rid of this bowing?

A. Well, we never really got rid of it. We might have got rid of a little of it by pushing the piece along on the die towards the end of the machine nearest the house, and I would square up the flange, as I went along, and sometimes we would have to hit a piece, as we call it, three or four times in order to square up the flange, and it would take out a little of the bow, but not so much as you would notice it.

Q. 6. And by hitting you mean what?

A. This same revolution.

Q. 7. This same downward motion?

A. Same downward motion.

Q. 8. About how many similar operations do you recall you have to go through on the average in order to get your angle straight and get your bowing out as well as you possibly could on a machine with a 10-foot length, 90-degree angle?

A. Probably four times.

Q. 9. Four times?

A. Three or four times."

After the piece came from the machine they took these stringers to a block and generally three men straighten

them out by peening. That condition still exists today or rather until the day I got through in January, 1929. I was present at the test when the machine broke. I don't know whether I had the 90-degree dies in or not. If I did have it in I put them in in the usual way, got a piece of 3/16ths scrap, set the machine, and then put on the piece I was to bend in the test. The hammer came down and completed one revolution for the first bend. After that I was told to turn the piece over and bend the opposite edge. I bent that edge and then again somebody said "once more", and I brought the lever down so that the edge came down gradually and bent over and the machine broke. That was on the third operation—the third revolution of the hammer. That was the 12-foot piece which is in the court room. Hovasse, Lerner and the two professors were pres- [fol. 88] ent from start to finish. After the machine was repaired I continued to bend stock on it for little over two years.

"Q. 10. At least two years. Now, just one thing more. What if anything did you notice with reference to the bowing of the product after the repairs had been done?

Mr. Friedman: Wait a moment. To that I object.
The Court: I will allow it and save your exception.

Q. 11. Go on, Mr. Carron.
A. I can't say there was any difference in the bowing.
Q. 12. That is to say——
A. It seemed to be about the same."

After the break an extra motor was put in to raise and lower the hammer because the attachment that came with the machine wouldn't work. That difficulty developed so it became clear almost from the start. We noticed it at the time. We always had some trouble with it.

On cross-examination:

The first day we started up the machine I heard a rumble on the first revolution of the hammer. We stopped the machine. Up to that time Hovasse had been responsible for oiling the machine. I don't know what oiling he did. I don't recall doing any except the main bearing over the head. Hovasse took down the 16-inch bearing, taking out the whole assembly. A few days later we started up the

machine again and from then on I was in charge of it. The 16-inch bearing kept getting hot. The flywheel bearing started to shoot brass a short time after we started the machine.

When we started we were bending risers out of ⅛ stock or 10 gauge and worked on them for several weeks. We first began on the heavier work some time after the Boston Engineering Company had been there around the first of September. Up to then we hadn't done any stringer work. Shortly after the clutch unit was reassembled and put back we started to bend stringers. I never bent anything over a ¼ inch thick, never used in operating that machine any metal heavier than ¼ inch. I was the only one in charge of operation of that machine and no one else operated it up to January, 1929. We never used or tried to use any ⅜ths-inch metal in the press. Of that I am positively sure.

[fol. 89] "X Q. 13. I am going to ask you just another thing. You say you have worked these pressed up in the——

A. Osgood-Bradley Car Company.

X Q. 14. The Osgood-Bradley plant?

A. Car Company.

X Q. 15. And did you have long pieces there?

A. Sixty-five to 70 feet long, some of them.

X Q. 16. And how heavy metal?

A. Quarter-inch up to three-eighths.

X Q. 17. And do you find that when such pieces come through the press they have no bowing in them?

Mr. Witte: Just a moment. Are you now referring to Osgood-Bradley?

Mr. Friedman: Yes. I am testing this man's experience.

Mr. Witte: Then I am objecting to the question.

The Court: I will exclude it.

Mr. Freidman: Will your Honor save my exception? Shall I make an offer of proof?

The Court: No, you needn't.

Mr. Friedman: Excuse me.

[Discussion at the bench.]

The Court: I refuse it and will save your exception."

Peening is hammering metal to straighten it out or put a bend in it. I don't recall ever having seen it done other than in Smith's.

"X Q. 18. Well, do you know from your own observation or experience what is the proper condition with reference to the bed of the press and the foundation?

Mr. Witte: To that I object.

The Court: I will allow that.

The Witness: On a ten-foot—they always as a rule—that the operator should keep the underneath part of the base clear on a ten-foot.

X Q. 19. Now, by 'clear' you mean there is a clearance?

A. There is a clearance underneath the bed."

From the first, in April, in operating the machine I noticed the clutch was wrong because it wouldn't properly engage or lower the head. That the 16-inch bearing heated [fol. 90] up. I noticed that the male part of the 90-degree die was wrong as soon as I first saw it, shortly after they came in in March, before we used the machine. I reported that to Hovasse and Lerner and told them that taking it for granted these dies were to be used to bend 3/16ths and ¼-inch stock according to my experience, the male die should have a radius on the edge that fits into the female die of at least or about equal to the thickness of the stock intended to be used. I used this 90-degree die when we done stringer work around the first of September. I might have used it before then on ⅛-inch stock but not for stringers. The male die then, as when I first noticed it, had a sharp edge where it fits into the female die. I complained to Mr. Hovasse and Mr. Lerner about that and told them it should have a radius on it to help us out in making a better bend. I made no changes in that die. The effect of the die as it was constructed "would be that the die couldn't get down far enough in pushing the metal to have these surfaces press up against the side, thereby helping the flange". We were using that die when the machine broke.

"X Q. 20. And wasn't it your desire to press that male die down further that brought about the breaking of that press?

A. I didn't do any different in regards to the test than I done on any other stringer work.

X Q. 21. Yes, we'll say that is so. But didn't you feel, didn't you have it in your mind that this particular male die didn't come down quite far enough to produce a right angle, and that you therefore felt you had to press it down a little further than you would have if it had been built according to your ideas with a greater radius?

A. I didn't use any more pressure on that test piece than I generally used on the regular line of stringer work. It was a regular job."

On redirect examination:

In my experience it would be better to have this sharp edge of the male die curved to a radius rather than pointed.

"Q. 22. In the particular machine in question, did or did you not have difficulty in bending one-quarter inch stock at a 90-degree angle without bowing?

[fol. 91] Mr. Friedman: I object.

The Court: I will allow it.

The Witness: Will you repeat the question again?

Mr. Witte: I think I ought to put it again but a little more intelligently.

Mr. Friedman: Your Honor will allow my exception?

The Court: Yes.

Mr. Witte: Well, we will put it again. Mr. Stenographer, will you repeat the question? See if you understand it. [The question is read.]

A. Yes, sir.

Q. 23. Now, what do you say in your judgment would be the probability of your being able to bend three-eighths stock at a 90-degree angle without bowing?

Mr. Friedman: I object to that.

Q. 24. In view of your experience on quarter-inch stock?

Mr. Friedman: I object to that.

The Court: I will allow it and save you exception.

The Witness: I don't think that the machine could bend three-eighths stock over a die two and one-quarter inch wide.

Mr. Witte: Never mind the die. We are talking about the three-eighths inch stock.

Mr. Friedman: Excuse me. He finished his answer.

Q. 25. Have you finished your answer?

A. I never done it, but I don't believe it could in one piece without probably sticking or doing something like that.

Q. 26. Now let me ask you this question: Whether or not in your opinion it would be possible on that machine, with the experience you had with it, to bend three-eighths inch stock at a 90-degree angle on that same die that you used for your quarter-inch without showing bowing?

Mr. Friedman: I object to that.

The Witness: No, sir.

Mr. Friedman: Save my exception.

The Court: Yes.

Mr. Witte: I may have the question?

[fol. 92] The Court: Yes.

Mr. Witte: The answer is no, sir. You said no, sir."

On recross-examination:

I never did any stringer work until September or October, 1926. This die was a 2¼-inch die. If it were a 3-inch die it would be a different question altogether with that 90-degree work.

Mr. Friedman: I forgot one thing, if your Honor will allow me to ask it.

The Court: Yes.

X Q. 27. Did you know that these iron pieces that you press are harder in some places and soft in other places?

Mr. Witte: One moment. I don't know whether this witness is qualified to speak of such matters.

Mr. Friedman: That is what I am asking him, if he has that knowledge.

The Court: How is that competent at this stage of the game?

Mr. Friedman: It isn't, but I asked your Honor's permission to put something in I had forgotten.

The Court: And I allowed you to put it in. I will then rule it out. Excluded, and I will save your exception.

William J. Dubois, called by Smith, testified:

I am president and general manager of the Boston Engineering Company, engaged in general machine repair work.

I called at the Smith plant at Mr. Shannon's telephone request. Exhibit KKK, as follows, was then introduced:

EXHIBIT KKK.

"August 16th, 1926.

George T. Shannon, 18 Tremont St., Boston, Mass.

Re A. L. Smith Iron Works. Our order #23557

DEAR SIR: We enclose copies of letters received from the above firm dated June 25th, 1926, and the 13th inst. and our replies to same dated June 28th, 1926, and even date, which are self-explanatory.

Please have some first-class machinist (no automobile mechanic) call at their plant and examine the flywheel bearing, which doubtless has not been properly oiled. This [fol. 93] is an American Roller Bearing, and, if it or any of its parts have been chewed up, it is because of carelessness of their workman not properly oiling the same.

Have the machinist you engage take off the flywheel bracket and remove the flywheel, all of which is an easy matter by using a ton tackle overhead, and then wipe off all dirt with kerosene, file off the burrs, and then make a careful report of what he found. Then replace the different parts and thoroughly oil and send us his bill for same with his report. A machinist from one of the large manufacturing plants in your vicinity would possibly be the best.

Their next note is due the 1st of September, which we have already given to our foundryman who will place the same in his bank for collection, and if the A. L. Smith Company does not pay this note, you will have a chance to sue him on same, as we will recommend your office to our foundryman.

Very truly yours, Geo. A. Ohl & Company."

Enclos. GAO. Jr.-S.

GEORGE T. SHANNON, called by Smith, testified:

I am a member of the Massachusetts and Federal Bar; represented the Ohl Company of Newark in 1926.

ARTHUR L. TOWNSEND, called by Smith, testified:

I am an instructor in the Mechanical Engineering Department in the Massachusetts Institute of Technology, teaching kinetics, automatic and applied mechanics. A man from the A. L. Smith Company came to our Division of Industrial Cooperation and Research and was referred to Professor Swett for information or advice about this machine and as I am Professor Swett's immediate associate I came into the particular work myself. About October 8, 1926 Professor Swett and I went to the Smith plant and inquired for Hovasse and Lerner, who were not there, went down, looked at the machine, asked them to bend a piece of plate to show us what the trouble was, a piece 10 or 11 foot long and 10, 11 or 12 gauge thick, about an 1/8th inch thick. The piece was bent, taken from the press, and showed a decided bow in two directions. I should say that the [fol. 94] bowing was somewhere between 3/16ths and 5/16ths of an inch. We left and returned on October 15th to take some measurements, went down to the machine with Lerner and Hovasse to find out if there was, and if so how much, deflection in the bed. A piece of 1/8th stock was put in the machine, one side was bent while we noted the behavior of the dial gauges we had had installed to measure the deflection of the bed. The operator started to bend this plate. We noticed some movement of the dial needle. I don't recall the figure; it might be 60/1000ths or 30/1000ths of an inch. That piece came out bowed similar to the one we saw the week before. Before we had the piece taken out of the machine, we had the operator make some repeat strokes while the piece was still in the die to see if there was any difference in the dial readings. As I recall it, they were a little less in the repeat strokes than in the original case.

We asked them to bend a heavier piece and a piece of number 7 gauge was put in the machine and that is 3/16ths. The operator put it in the machine. We were observing the dials and one side was bent. Then we asked him to come down on it again so we could watch the dials and I think he came down on this side may be one-half dozen times. We noticed the bed had considerable movement, up and down. This we noticed both by instrument and vision. We speculated among ourselves as to whether there was

an actual deflection of the bed or whether the whole bed was moved up and down. We then had the plate turned over and bent the other side. Then we asked to have a repeat stroke and on the first or second repeat stroke we heard a loud explosion, looked around and found a bad break in the stanchion to the left of the operator. We looked at the broken stanchion and as it was only separated by a 1/4 inch we couldn't see the inside condition. We chipped out a few samples from the edge of the break thinking to put them under microscopic examination to see what was the condition of the metal. We went to the office when Professor Swett dictated a statement covering what had happened that afternoon. I visited the plant once or twice [fol. 95] after that. I gave study to the problems of bowing and what caused the machine to break during that fall. I did not then compute the power required by the hammer, taking that from other sources. Since November 1926 I have made further study of the machine, its operation and cause of the break. In my opinion the machine could not bend 3/8ths inch material of 12 foot 6 inch lengths on dies the female member of which was 3 inches across. It might bend it once or twice or for a week or a month, depending upon frequency of operation, but sooner or later the machine would break. Professor Norton of Harvard submitted to Smith a report of his investigation on the load required to bend and set 3/8ths inch steel 12 foot long on this machine which he computed at 800,000 pounds. In our original computations of the machine we used that figure and found a reasonable factor of safety in the sections where the machine broke. A year ago [date of testimony April 24, 1929] at Lerner's request I called at Mr. Witte's office and met Perkins, a machine manufacturer, with whom I discussed this machine and as a result I further studied these loads or stresses, studied up and read on the subject and reached the opinion that the load required to bend 3/8ths plate was from a 1,700,000 to 2,000,000 pounds instead of 800,000. I understood the figure of 800,000 arrived at by Professor Norton was simply what he obtained from putting small pieces of plate in the ordinary testing machine—what we call the ordinary laboratory testing machine which applies the load very slowly indeed. On that basis the factor of safety was about two and one-half, which is altogether too low in machines of this general type,

which should run from 6 to 10 or 12 with 7 as a fair average. I determined this factor by a process of physics and applied mechanics assuming the ultimate strength of the material used in the stanchions, made of cast iron, at 20,000 pounds a square inch, a fair average for cast iron. [In about six pages of transcript the witness explained how he arrived at these results.] An additional reason why the factor of safety of 2½ is altogether too low, is due to the fact that this is what is known as a dynamic machine, where the load is applied through moving parts, rather than a [fol. 96] static machine, where the load is applied by hydraulic pressure.

I heard Mr. Wilhelm's testimony with reference to variation in thickness of steel. If the hammer were adjusted precisely for 3/8ths inch material and there was a 10 percent variance in plate a stress on the machine would be effected. If there is more material in the machine than the machine was set for and the machine is operated there is more stress in the end frames. If the material is too thick the machine will stall. If it is only a little thicker the machine will operate with slightly different loads. I *I* know no way of calculating those excess loads. Because of this condition a reasonable factor of safety is required. Three-eighths steel requires greater power than 3/16ths. When you bend a piece of plate and bring the hammer down on it the plate bends and in order to be sure to get a 90-degree bend there has to be a certain amount of squeeze or pressure at the bottom of the die to set it. That occurs on the first blow. When you come down on the second blow you push the material a little, not so much as the first time, but with some pressure. That pressure depends on the elasticity of the different parts of the machine. The trial and error method of adjustment is the accepted method on machines of this type.

"Q. 1. Now, have you made some study of these presses as a result of this inquiry and to prepare yourself to testify with reference to the workmanship—what is and what is not proper bending and bowing and that sort of thing? In other words, as to——

Mr. Friedman: Let him answer that question, won't you please?

Q. 2. If it is clear to him. I don't want to have him answer a question that isn't clear.

The Witness: Will you repeat the question, please, Mr. Stenographer.

[The question is read.]

The Witness: Yes.

Q. 3. And as a result of that have you an opinion as to whether or not this variation of this bowing that you have described in work produced in this press was reasonable, [fol. 97] workmanlike bowing or not?

A. It looked very unworkmanlike and a very unreasonable amount of bowing."

Friction clutches are not satisfactory for that type of work. Our experience has been that friction clutches are not satisfactory mechanism for that particular sort of work; they never work when you want them to and they always stick when you do not want them to. Even if the clutch was thrown out *of* the power from the rotating flywheel would continue. The clutch is between the flywheel and the gears operating the machine.

"Q. 4. In your opinion did the placement of that babbit affect the structural safety of the machine?

A. No, I don't think it did.

Q. 5. What effect did it have?

A. It had the effect of putting no flexibility in the bed, no chance for the bed to move any way downward, or the end frames to come up, and that brought about the loosening of the holding down bolt.

Q. 6. As that machine was constructed and designed, was support under the bed provided for in its foundation?

A. No."

Subject to Ohl's exception he testified:

There was no safety device on the machine as there are usually on machines of this type.

"Q. 7. Have you studied brakes and power presses and machines doing this type of work, punching and shearing, that type of machine?

A. We use them for instruction purposes in our classes regularly, and for the last ten years.

Q. 8. You mentioned also having experience in the field, passing upon factory construction for the insurance company?

A. Yes.

Q. 9. In the course of that work did you give attention and thought to the presence or absence of safety devices in machines?

A. As my work made it necessary.

Q. 10. Now, I will ask you whether or not——

The Court: Now, I still want another question—whether or not in such machines as put on the market, as generally used, there are safety devices? That's what I want to know.

Q. 11. Yes. In such machines as this machine, as sold commonly in the market, are there safety devices?

A. There are.

[fol. 98] The Court: Now, you may inquire and I will save your exception.

Q. 12. Now, in your opinion was this machine, constructed as it was without a safety device, proper construction?

A. I don't consider it was."

In designing a machine, we calculate the normal loads imposed upon the machine and include a reasonable factor of safety in designing the part. In order to prevent the rupture of some vital part of the machine in some circumstances a relief or safety device is put in the machine which of itself will release itself or -et go and prevent damage to some more important parts of the machine.

On cross-examination the witness testified:

Professor Swett is really head of the department in which I am instructor. I made a written report and gave a copy to Ohl's representative and Smith's representative. That was dated November 22, 1926. In making it I had a copy of Professor Norton's report to the Smith Company dated July 12, 1926. Professor Norton is one of the professors in the department of mechanical engineering at Harvard. That report is as follows:

EXHIBIT 19

"July 12, 1926.

A. L. Smith Iron Works, Chelsea, Massachusetts.

Attention of Mr. Lerner

GENTLEMEN: At your request I have made an estimate of the probable load which could safely be allowed on your Ohl press if used as a multiple punch machine. I am able to report as follows:

1. Manufacturer's Statement.

The manufacturers of this press having stated that the machine was capable of cold bending steel plate 12 feet long and 3/8 inch thick to a 90 degree angle, it was decided to make tests to see how much force would be required to do this. I find the results to be as follows for a 3/8 inch plate, 12 feet long:

[fol. 99] With a rather sharp pointed die 792,000 lbs. or 396 tons.

With a blunt die 888,000 lbs. or 444 tons.

To be on the safe side, I shall assume the manufacturer's statement to be equivalent to the lower of these figures—i. e. 792,000 lbs. or 396 tons.

NOTE.—The steel used in the test was 3/8"x4"x12". The readings of the testing machine were for the length of 12". By multiplying these readings by 12, the above figures were obtained. The steel was reported by Mr. Lerner as open hearth steel with 15 to 20 points carbon. Our test showed it to have Brinell hardness number 137, which is a good check on carbon content.

2. Strength of Machine Parts.

I have checked up two parts of the machine to see if the stresses induced therein by the assumed load of 792,000 lbs. are reasonably safe for the materials. The two parts are (1) the cast iron cross beam which pushes directly down upon the work and (2) the two large gear wheels at the top of the machine on the slow speed shaft with the two eccentrics.

Stress in Cross-beam.—This beam is approximately 150 inches long and 3′ 10½″ deep at the middle. The load is applied by the two eccentric rods at the top at two points approximately 30″ from each end. I estimate that the bending stress induced by the load of 792,000 lbs. is within a safe value for cast iron. Also the shear is safe for this load.

Stress in Large Gear Wheels.—Each of these two wheels have 128 teeth. I estimate that the bending stress in the teeth induced by the load of 792,000 lbs. is rather high for ordinary cast iron, but safe for a good grade such as is ordinarily used for cast-iron gears.

3. Motor Load.

If the above load of 792,000 lbs. is put on the machine, I think the motor load is the governing factor. It is practically impossible to calculate in advance what current will be demanded. In fact, the manufacturers of such machines [fol. 100] probably rely on their own experience with previous machines of like design, and allow a liberal size of motor. Hence I would suggest that you go ahead and build the fixtures you intend to use, assuming that the motor is adequate.

When you have them ready simple tests could be made of the electrical imput while they are in use by means of electrical instruments which would measure the imput.

4. Table of Punching Loads.

We made tests to determine how much force was required to punch holes in steel of same carbon content, and from these tests computed the number of holes which could be punched if the same total load were reached (792,000 lbs.) as per manufacturer's statement.

Tests showed the following results:

Punching one 9/16″ hole in a 3/8″ plate requires 34,800 lbs.
" " " " " " 3/16″ angle " 18,600 "

By interpolation I estimate that
Punching one 9/16″ hole in a 1/4″ plate requires 24,000 lbs.
" " " " " " 5/16″ " " 29,400 "

Holes of other diameters would require punching force proportional to the diameter in each case.

From these figures, I have prepared the table below, in which are shown the number of holes which could be punched if the total force is 792,000 lbs. as stated by the manufacturer.

	Diameter of holes		
Thickness of Plate	3/8"	1/2"	9/16"
3/16"	63	47	42
1/4"	49	37	33
5/16"	40	30	27
3/8"	33	25	22

I would suggest that you arrange your multiple punches so that they go into action successively; that is, one set entering the metal slightly before the next one. Also try [fol. 101] to have the punch point protrude not more than 1/16" thru the hole at the completion of the stroke.

If you desire any more work done on this problem, I shall be glad to take up the matter with you.

Respectfully yours, Arthur E. Norton. Arthur E. Norton."

AEN/KEM.

I accepted Professor Norton's figures in making my November, 1926, report. About four months ago [testifying on April 25, 1929] I made tests on dies I got from the Smith Company, getting unsatisfactory work, using 3/8ths-inch stock about 12 inches long, making four or five tests. These I made last January getting on the first piece a reading of 68,000 pounds, the second piece 68,000 and the third 77,000 and the fourth about 70,000. I was using a *a* female die 2¼ inches across the corner. I made no experiments on a 3-inch female die. The pressure required to bend metal across a 3-inch die is different from the pressure to bend material across a 2¾-inch die but the pressure required is no different between the two dies in setting the material at the bottom of the die, taking less pressure to bend metal on a 3-inch than on a 2¼-inch die. In my opinion, it makes no difference in the pressure required to set the material in the bottom of the die. It makes a difference in the effort required to crack the plate and bend it, but the final pressure at the bottom is the same approximately. I can't tell whether in my test I used either a blunt or a sharp pointed die. It wouldn't make any difference in the amount of force required to bend the material but it would in the amount

of force to set material to a 90-degree angle. I made no calculations about the Ohl press based only on my own experiments and figures.

"X Q. 13. All right. That is, if I have got this in mind, we now have the elements that you used in this opinion of yours: Something Mr. Perkins told you, something you read in a book, something you read in a magazine article, and, in part, some calculations which you hadn't gone through with to a final conclusion on your own experiments. That's fair, isn't it?

[fol. 102] A. I didn't get the first part of the question. I thought you had finished when you hadn't.

[The question is read.]

A. In our work that's the way we always get our facts.

X Q. 14. No.

The Court: He asks you if that is a fair statement.

The Witness: Yes, that is a fair statement."

Even if the operator of the machine is skillful enough, he needs one of these fool proof devices.

I did not examine the 25-inch flywheel clutch, its mechanism or housings. A friction clutch even though properly adjusted does not serve as a safety device except under rare circumstances.

The factor of safety I computed for this machine would be about 3½ assuming a load of 1,700,000 pounds. On Professor Norton's figures it would be approximately 7, the average factor of safety for that sort of work. In my figures I assumed a tensile strength for the cast iron stanchions of 20,000 pounds to the square inch. I didn't take any actual samples out of the side frame. If I had done so I could have determined the actual tensile strength. If the tensile strength was 24,000 instead of 20,000 my factor of safety would increase in the direct ratio of 20 to 24.

With reference to my report of November 22, and my criticism of the female die, I have never built any dies, have never done any practical work with dies, have had no previous experience with this kind or type of die and made no experiments about the construction of dies or to determine the breaking point of these dies. I made calculations concerning the side walls of this female die, assuming a

pressure of about 400,000 pounds on each side, a half of the 800,000 pounds. If I used 2,000,000 pounds instead of 800,000 the figures would probably show that the dies should have broken long ago. In these die calculations I assumed 3/8ths-inch material on the die. I don't know whether or not that die was made for 3/8ths-inch material. It would stand up for 1/8th material with a certain amount of yawning and it might stand up for a 1/4-inch material for a time but with excessive yawning. My opinion would [fol. 103] be different if I knew that that die was built for an 1/8th- and 1/4th-inch material as a maximum.

I did not have called to my attention the statement contained in Exhibit 18 that this die was "to be made as narrow as possible as it will only be expected to bend metal a ¼" thick maximum." I have seen the repairs the Smith Company made on the machine in the way of yokes, bars and supports. My opinion was that the repairs could best be made through thermite process welding. Had that recommendation in my report been followed the machine would have had the same width and could have used the same size material as before the break. I had nothing to do with the repairs actually made. I have observed the manufacture of this class of material in steel fabricating plants, observing the product, but can't state from my observation how the product from this press compared with the products of other manufacturers with regard to bowing. I don't know from my own observation whether or not peening operations for that class of work are performed by other manufacturers. My criticism of the bowing was based on what the builders theoretically wanted as compared with the product which I saw in its preliminary state.

[The report in question was then introduced as Exhibit 20, as follows:]

EXHIBIT 20

"Mr. Martin Witte and Mr. Ernest J. Sanderson, c/o Mr. Martin Witte, Boston, Mass.

In re Investigation of Ohl Press at A. L. Smith Iron Works

GENTLEMEN: At your request we submit the following report on this machine, together with recommendations for correcting the existing trouble.

A preliminary visit was first made to this plant to acquaint ourselves with conditions. At this time we saw a piece of approximately #12 gauge material about 10 or 11 feet long bent in the press. It was plainly evident that the results were not satisfactory. There was a decided bowing of the plate, in two directions, after bending. The directions of bowing were opposite to the direction of the [fol. 104] bending operation. Owing to the absence of Mr. Lerner and Mr. Hovasse, arrangements were made to make some tests with respect to deflections, etc., one week later.

At this time some bends were made on #10 gauge stock with the same unsatisfactory results, namely, the plate show- a decided bow. Indicator readings taken on the bed showed what seemed to be excessive movement with respect to the floor. A piece of #7 gauge was then tried and after making two bends, and several repeat strokes in the first and one in the second, the end upright or stanchion, at the opposite end from the motor, broke in two places.

A third visit was made on November 12th, to take some measurements and other data to assist in drawing conclusions as to the unsatisfactory operation of the press.

Of prime importance in this investigation there seem to be four important questions:

(1) Did the machine produce unsatisfactory work?

(2) What causes the production of the poorly fabricated work?

(3) What caused the machine to break?

(4) How can the trouble be remedied?

These questions will be discussed in the order given.

Question No. 1. Did the machine produce unsatisfactory work?

It was plainly evident that at the time during which he saw the press in operation, the work produced was not straight (lengthwise) and the corner of the "90 degree" bend through the central portion of the work was not well defined, nor did it appear to be 90°. Nearing the end of the work, this latter condition was not so marked. In fact, at the ends the corners seemed to be well formed. The lack of alignment (bowing) and the malformation of the corner portion through the centre increased indirec-ly with the thickness of the plate and also directly with the length of plate bent.

[fol. 105] On the short lengths of light material the lack of alignment etc., while present, was not of sufficient magnitude to interfere seriously with immediate uses or operations to which the material was put. On heavy material and with long lengths of all thicknesses, the malformation described required that the work be straightened elsewhere before subsequent operations could be performed.

Question No. 2. What causes the production of poorly fabricated work?

We are firm in our belief, that the principal factor in producing the unsatisfactory work, is a poorly designed and weak die.

A careful analysis of the operation of the machine, together with calculations based upon load values supplied by Prof. Norton, convinces us, that with respect to excessive deflections, there is nothing radically wrong with the machine.

It is true as mentioned in the introduction, that during the tests, indicator readings showed excessive movement with respect to the floor. This we believe to be a movement of the whole bed up and down horizontally, due to not setting firmly on lower ledges of the end frames or uprights. This condition has been brought about by the tentative but ill advised arrangement of the heavy bedding under the center of the bed, and the subsequent lifting of the end frames when loads were applied. Some loosening of the ends of the bed with respect to the end frames was bound to occur. This movement of the bed is not to be confused with deflection which occurs when the ends of a member are held rigid and the centre if deflected downward, due to the load supported or resisted. From the operation of the machine this type of movement or deflection could not occur.

Referring again to the die, attention is called to the construction of the female portion of the die. The supporting side walls are excessively thin, especially when it is considered that part of them have been cut away for the plac- [fol. 106] ing of tool steel inserts. Investigation of this condition from the theoretical standpoint discloses such results as to lead to no other conclusions.

Question No. 3. What caused the machine to break in the end frame or upright.

The machine broke for two reasons:

First an excessive load was applied and second because there was no efficient safety device to operate, when the machine was overloaded.

Examination of the breaks shows that material is of frail composition, and apparently homogeneous. Further, the cross sectional area at the breaks is sufficient to withstand the maximum operating load of the machine, with a reasonable factor of safety. The conclusion which must be drawn is that an excessive load was applied.

An excessive load would be easily applied if the adjustment of the position of the stroke of the plunger were such as to give to the closing of the die, an amount very slightly in excess of the proper distance required for thickness of stock to be bent. This could have been very readily brought about, by a desire to "squeeze" the plate an additional amount, to try and offset the bowing condition produced in the bent plate, previously described. Also the repetition of this slight excessive closing of the die from previous operations had weakened the machine in a vital spot and eventually caused the rupture.

To our minds however, the most serious indictment against the design and construction of the machine, is the lack of proper safety device. It is an accepted fact that machines of this type when properly designed should have an efficient form of safety device which would let go, when excessive loads were applied in the machine, and thus save the more expensive and vital parts from serious damage rupture. The more commonly used devices are shear pins and shear keys, located where they are easy of replacement, [fol. 107] and having factors of safety of about 2, to ensure their failure before other parts of the machine. Friction clutches and the like are very undesirable owing to their unreliability of operation or lack of operation.

Question No 4. How can the trouble of defective work be remedied?

To our minds a properly designed die will eliminate the question of defective work. The female portion of the die should be made of heavier material, that is wider, so that there will be at least a thickness of one inch of solid metal outside of the tool steel inserts, preferably more. Also the die should be made to set directly upon the bed, without any secondary support, especially of the I beam type such

as is now used. The firmer the die, and the more rigid the connection between the due and the bed, the less chance is there for excessive deflections.

Since the angle of the finished work is to be 90° the angle of the die should be a few degrees less, to allow for spring back after bending.

Also the bed should be readjusted to set firmly on the ledges provided for the purpose and all sub-supports etc., should be removed from the centre of the bed.

The end frame we believe, can best be repaired by welding, through the Thermit Process.

In the following we have briefly summarized the important points of this report.

First. The machine up to the time of breaking did produce unsatisfactory work.

Second. The defective work was due chiefly to a poorly constructed die which did not give proper backing when the plates were bent.

Third. Although the main frame broke due to the application of an excessive load, such an event would have been prevented had the machine been equipped with an efficient safety device.

[fol. 108] We have also been informed by members of the Smith Organization concerning certain other features with reference to the design and construction of the press, which would lead us to believe that the manufacturers had not exercised the best methods in designing or building the machine. While we believe the sources of this information to be reliable, we cannot express these opinions as our own.

Verbal expression of the ideas contained in this report may be of assistance, in clarifying any of the points discussed, and should you desire a conference on this matter we would be pleased to serve you.

Massachusetts Institute of Technology, Cambridge, Mass., Nov. 22nd, 1926.

Respectfully submitted.

George W. Swett, Arthur L. Townsend."

On redirect examination, Mr. Townsend testified:

Welding the breaks would not have increased its original factor of safety. The edge of the dies do not take the ulti-

mate load of the machine as the seat of the load is at the bottom of the die. I used the whole load in calculating the edge. The whole load is used in setting and not in bending the material. I understood from Professor Norton's report his tests were based on one-foot specimens. To bring the result up to twelve feet we multiplied by 12. He used a very slow motion laboratory machine, much slower than the machine in question. Accordingly a factor of 2 is generally implied. Multiplying Professor Norton's load of 800,000 pounds by 2 I got 1,600,000 pounds. In my own tests I got substantially the same readings as Professor Norton, but I multiplied them by 2. With the construction of this 90-degree male die the action is down on the sides and in the corner of the female die. It makes no difference to the load on the machine whether the female die is 2¼ inches or 3 inches across.

On recross-examination the witness testified:

In my tests I got roughly the same figures as Professor Norton, and from their result arrived at approximately the [fol. 109] same load of 800,000 pounds. I multiplied that figure by 2. The factor of safety I found based on a 800,000 pound load was approximately 7. Using a 1,600,000 pound load it would be 3½.

"The effect of a thick piece of stock in there over what you originally set the dies for has the same effect upon the machine as maladjustment of the hammer."

"X Q. 15. Over stress?

A. Puts an overload on the machine.

X Q. 16. Now, that is something that the operator of the machine in his experience and skill and his 'trial-and-error' proposition is supposed to meet and overcome?

Mr. Gallagher: To that I object.

X Q. 17. Is it not a fact?

The Court: All right.

The Witness: Can't you repeat the question? There is one point I just missed in it.

X Q. 18. Will you please read it, Mr. Stenographer? I will put it again. It is easier this way: It is part of the job of the operator of that machine with his experience

and skill to make the adjustment of the dies in the hammer from time to time to meet this commercial variation in the steel plates, isn't it?

A. Do you mean he has to make adjustments whenever a new piece of steel comes along?

The Court: What he means is that an experienced and proper operator will allow for that in making his adjustments. That is the question.

The Witness: I will have to answer that by an explanation.

X Q. 19. Can't you answer that yes or no?

A. I don't think I can conscientiously."

Hiram A. Lerner, called by Smith, testified:

I have been with A. L. Smith Iron Works for sixteen years; am in charge of production and purchasing for the last eight or nine years; am vice-president of the company; am familiar with the Ohl machine since it came to the plant. That machine first was called to my attention in April, 1926, in connection with heating of the bearings. I next had to do with the machine around the first of [fol. 110] August. I saw Kolarsy at our plant on September 1st, and went with him to the machine and talked with him about the flywheel or clutch assembly which the Boston Engineering Company had taken out. I told him the serious part in my mind is the fact that the stock doesn't come out straight. I remember seeing Mr. Hovasse hand Mr. Kolarsy a level, and saw Mr. Kolarsy put it on the machine. I asked whether the machine was set up all right, and he said: "Yes; she is set up all right." I asked: "Is she level and plumb?" He said: "Yes, she is level and plumb." I asked him whether he had inquired from Mr. Hovasse how he intended to fix the clutch assembly up or that flywheel, and he said: "Yes." I said: "Is that all right?" He said: "Yes; that man knows what he is doing", or some expression like that.

I have charge of the factory cost records. From the cost sheets from the week ending August 26th to the week ending September 7th, our labor costs for repairs on the flywheel clutch assembly show a labor cost of $285.72, a

total of direct costs, including labor and materials and indirect costs of overhead, of $673.44. The repairs on the broken left stanchion for the week ending October 21, 1923 through the week ending November 25, 1926.

"Q. 1. What was the total cost of that?

Mr. Friedman: Does your Honor allow that?

The Court: Yes, and I will save your exception. Go ahead with the total.

The Witness: $1,858.31."

The witness testified that he had records showing the production costs of stringers made on the Ohl press for the period beginning with April, 1926 to April, 1929.

On cross-examination the witness testified:

I am a technical man in my own business, the iron business, in its general quality and quantity, fairly familiar with the manufacturing process, in charge of production and purchasing and occasionally selling. Being shown a bill from the A. L. Smith Iron Works of October 11, 1927 to J. F. Dailey and a piece of tracking, he testified: I think I remember the order and I think that [referring to the tracking later introduced as Exhibit 23] looks like the [fol. 111] piece of tracking the order called for and the one called for by the bill. Simpson is our shop superintendent. I may have introduced Dailey to Simpson. I don't recall whether I said anything to Dailey about this Ohl press doing good work. Dailey came to me as a prospective customer with certain work that he might want us to do.

[The bill in question was marked for identification "Exhibit 21".]

In the cost figure of $673.44 indirect cost or overhead was figured $274.50. I don't recall that I got any figure on how much it would cost to make repairs as suggested in Professors Swett and Townsend's report.

On redirect examination the witness testified:

We discussed the professors' recommendations among ourselves. Welding would require the taking down of the machine, then welding the broken part, then reassembling and relining the machine.

On recross-examination he testified:

The figure for the October and November repairs of about $1,800 included $650.38 for labor, $536.53 for materials and $671.40 for overhead.

FRED PERKINS, called by Smith, testified at follows:

I am a manufacturer of power presses and shop metal machinery, in business thirty-five years, with the Perkins Machine Company at Warren, Massachusetts, making power presses. I have studied power presses, their operations, mechanisms, construction and all matters concerning them. I have been in touch with the market and other presses on the market.

"Q. 1. And among them the Ohl press?

A. Why, not exactly, only just some catalogues that I had seen.

Q. 2. That is what I mean. In some cases through catalogues and literature?

A. Literature.

Q. 3. And in some cases by direct observation?

A. Observation; yes, sir."

We have made presses up to over 2,000,000 pounds ca- [fol. 112] pacity. I have made stress calculations, safety factor calculations and safety device calculations based on construction and material used, considering the strength of material and the development of power to the point of action, considering the variation of the material in its density, softness or hardness and thickness, considering operation with regard to the proper setting of material.

A power press of normal type, of cast iron, has its factory of safety approximately six to one. In setting the press the trial and error method is used, the error coming in through the variation of the commercial material and in its density, a condition generally known to the trade.

"Q. 4. I see. Now, among other methods of overcoming any effect of that kind resulting from variance, whether or not you have in your course of studies considered safety devices?

A. I have.

Q. 5. And I will ask you whether or not that is proper construction in your opinion in a metal-forming press to operate it without or cause it to be operated without some sort of a safety device?

Mr. Friedman: Wait a minute. I object to that.

The Court: Hadn't you better detail the size of it a little?

Mr. Witte: Yes. We will now assume that the press, this metal-forming machine, is called upon to bend anything up to three-eighths commercial steel in dies 2¼ inches across and downward at angles of 90 degrees or less.

Mr. Friedman: To that I object.

The Court: I will allow it and save your exception. Is it proper to use such a die without a safety device?

Mr. Witte: Such a machine?

The Court: Such a machine.

The Witness: With proper allowances in its construction, yes.

Q. 6. Proper allowances in what?

A. In its construction.

Q. 7. What do you mean by that?

A. I mean by that by additional material of stiffer nature, either being inserted or shrunk into the casting of which this machine may be designed.

Q. 8. In other words, if the factor of safety is great enough?

A. Is great enough.

[fol. 113] Q. 9. What is the least factor of safety that you can state such a machine can get along with without safety devices?

A. Six to one."

I saw the Ohl press at Smith's plant in March, 1928. Its left stanchion or side frame was broken or cracked. I measured the cross section area at the breaks.

"Q. 10. And did you make any tests to find what class of metal it was that was in those stanchions?

A. Only from observation.

Q. 11. And what would you say from observation it was, not the quality, by the class?

A. Cast iron.

Q. 12. Do you know anything about the quality of that metal from what you saw?

A. That would be hard to tell.

Q. 13. Now, what was the class of cast iron, if you can tell us?

Mr. Friedman: Wait a moment.

Q. 14. Are there different classes?

A. There certainly are.

Q. 15. What was this particular class?

A. Why, from my observation I would say it was the ordinary gray iron casting."

I observed the method in which the power is transmitted to perform the machine's functions and took measurements to see the developed power of the machine. I didn't observe any safety device on it. There was nothing of that sort to be seen. Later at my plant I made calculations based on those observations and measurements which I later took up with Mr. Townsend of Technology.

"Q. 16. As a result of these computations you made and the different consultations you had with Townsend, what conclusions did you come to as to the factor of safety that was provided for in this Ohl machine?

Mr. Friedman: That I object to.

The Court: I will allow it and save your exceptions.

The Witness: From our observations and our calculations we decided that the machine was far below in factor of safety to properly do the three-eighths by twelve-foot section it was designed or guaranteed to do."

To properly form and set a piece of ⅜ths steel 12 foot long at a 90-degree angle takes 1,080 tons. I made tests [fol. 114] at my plant. The factor of safety in this machine was not sufficient to bend ⅜ths steel without danger of eruption, nor is it capable of bending even as much as ¼ inch steel. The machine operator is not expected in adjusting his machine to make provisions for the commercial variance in material after he has found his gauge with the scrap test. The machine should do its work on the material after the trial-and-error setting is made.

"Q. 17. Yes. Assuming, Mr. Perkins, that the machine had one of these two and one-quarter inch dies on it, that

it was at that moment being called upon to bend a three-sixteenths piece of steel, of either ten or twelve feet, I can't recall which now, at an angle of 90 degrees, and that it had been properly set to receive such a piece of metal, and that after the first downward stroke the machine broke in the places where you have noted, taking those facts into account, and that the break came on the second downward stroke,—taking that assumption, that hypothesis, and what you saw of the machine, are you able to tell the court what in your judgment caused that break?

Mr. Friedman: That I object to.
The Court: I will allow it and save your exception.

A. I should say that the machine had reached what we term its elastic limit, or what is set up in machines of this type, crystallization, or, as it reaches its point of what we call fatigue—after the machine, especially cast iron, after it has been under stress it causes that crystallization to set in. Then, at times, it may run for a period and then a slight excess strain may be put on it and it will let go through that fatigue which has set up——
Q. 18. Go on. Have you finished?
A. I think that sufficient."

That slight excess strain might be attributable to commercial variance in the steel.

I made my tests on soft machinery steel on different dies, one being sharp the other rounded with a 3/8ths inch radius. I used pieces of steel for the tests 3/8ths of an inch square.

"Q. 19. Now while they are being marked, Mr. Perkins, I will ask you, taking the hypothesis I have given you before, and considering the machine as you found it, and [fol. 115] taking into account all the calculations and other consideration that you have given to it, whether or not the machine in question could possibly have bent three-eighths-inch steel?
A. Absolutely——

Mr. Friedman: Wait a minute. I object.

Q. 20. Well, I haven't finished anyway, Mr. Friedman. Twelve foot six inches long on dies 2¼ breadth, the kind that you saw, and a 90-degree angle?
A. It could not.

Mr. Friedman: I object.
The Court: I will allow it and save your exception.

Q. 21. Now, assume the spread of the die was three inches and all the other hypotheses were the same, could that machine have bent three-eighths?
A. No, sir.

Mr. Friedman: I object to that.
The Court: I will save your exception.

Q. 22. Could it have bent one-quarter?
A. I hardly think so."

Subject to Ohl's exception to the question "Whether in your opinion the workmanship and the material of this machine are of the best?", the witness answered: "It was of poor material and poor construction." The court refused Ohl's motion that the answer be stricken out as irresponsive, subject to Ohl's exception.

The witness testified:

I have had experience in buying and selling machines of this nature. I have seen an Ohl press, not of the 12-foot type, except the one at the Smith plant. I have seen the lighter types, 8 to 10 foot long.

"Q. 23. Bearing that in mind, that Ohl machine of 8 or 10 feet, and add to it 2 feet, and assume in all other respects it is the same as the 10-foot machine, except that it is 12 feet, and will take a 12-foot piece, and that it was expected to bend up to 3/8ths, or 3-8ths metal, 12 foot, on square dies, the female of which measures 3 inches across, and that the machine was of the general type that is pictured in these prints that I show you marked 'Exhibit 14'—bearing that in mind, and then bearing in mind what you saw of that machine and its operations, and bearing in mind that was delivered in March of 1926, and then take into account what you saw of that machine and its limitations and infirmities in March, 1928, and bearing in mind all of the infirmities

[fol. 116] that you know about the machine, what, in your judgment, was the fair value of that machine in March of 1926?

Mr. Friedman: I object to that.
The Court: 1926.
Mr. Witte: Yes, 1926.
The Witness: As I interpret it——
Mr. Witte: Wait a moment.
The Court: I don't know. Come up here.

[Discussion at the bench.]

The Court: I will allow it and save your exception.
The Witness: Knowing that the——
Mr. Friedman: Pardon me just a moment.
The Court: You may answer.
The Witness: Knowing the deformities——
Mr. Friedman: No.
The Court: What is the fair valuation?
The Witness: What I place as fair valuation?
Mr. Witte: Yes.

A. I have got to assume those deductions.

Mr. Witte: Yes, come to the net results.
A. Net results—I should say about $2,500."

We are not a competitor of the Ohl Company because our machines similar to this type are for blanking, forming or piercing.

"Q. 24. One thing I am reminded of that in my endeavor to hurry along I had forgotten. You heard something about bowing in this case?
A. I have.
Q. 25. And I presume we can all agree that bowing is some bend in the product?
A. A bend in the base.
Q. 26. A bend in the base?
A. Yes, sir.
Q. 27. Have you from your observation and study formed any opinion as to the cause of this bowing with the product in the machine in question?

Mr. Friedman: I object.
The Court: The cause of what?

Mr. Witte: Of the product of this machine.

The Court: I will allow it and save your exceptions.

[fol. 117] Q. 28. In stringer work?

A. The base wasn't sufficiently given material enough, and from my observation I observed there was a large hole in the center of the bed which greatly weakened that cross-section. There is a hole here that comes down through the bed, which you couldn't observe on the drawings and blueprint. There is an oblong hole in the center of the base, which measurements I did not take.

Q. 29. It does not appear in these prints, Exhibit 14?

A. Which I couldn't see.

Q. 30. And is that sufficient in your judgment to cause this bowing?

A. It greatly reduced its efficiency.

Q. 31. Are there any other factors that enter into the bowing result, if any?

A. Why, no, I can see none other than the weakness of the bed."

On cross-examination the witness testified:

We make machines for punching, blanking and forming shearing. The bulk of our work now is in making light machines of 5 to 6 ton weight. Some of the machines were up to 100,000, and likely 400,000 pounds. I saw the Ohl press in question only once. I made my report from notes I then made but which I have since destroyed. Before I made my report I bent 3/8ths pieces one inch wide on a ton press, on a 2¼ inch die. I had no measuring device but from the stress used on the machine and a formula I computed the pressure required. I haven't those calculations with me. I didn't save them. I made those back in March and based my report on them. I made no test on the Ohl machine. I did not see the blueprints, plans and specifications for this machine. I don't know whether the machine corresponds to the plans and specifications in the order or not. I did not examine the dies. No complaint was made about the dies.

It takes 2,000,000 pounds pressure to properly bend and set 3/8ths inch thick soft steel material. I arrived at that by taking from the text books 60,000 pounds per inch re-

quired to shear that metal, multiplied that by 3/8ths of an inch by 12 feet or 54 square inches.

[fol. 118] X Q. 32. And that produces 1,000 tons?

A. Yes. That is, in order to hit the metal and bend it, it takes 1,000 tons.

The Court: It doesn't, unless I don't know how to figure. It would take 1620 tons as I get it.

The Witness: Well, I guess that would be nearer. I guess I am carrying too many figures in my head."

"The Witness: That is all technicalities. Now, do you wish the other formula?

X Q. 33. Yes, sir.

A. I took a piece of three-eighths thick, one inch wide, and I put it into a machine that had a four-inch stroke. This machine was back geared at ten, and I think a fraction to one. It had a pulley on it and back shaft of 18 inches, and by placing a strap over the pulley and adding weight we determined by weight through our leverages to the point of bending movement that it took 7½ tons.

X Q. 34. That is the actual experiment?

A. That is my actual experiment. That is all.

X Q. 35. I thought you said there were three?

A. I said possibly two or three.

X Q. 36. Those are two?

A. The two main ones; yes.

X Q. 37. Let's see if I get this correctly. Your actual experiment showed 7½ tons?

A. Showed 7½; yes.

X Q. 38. And the theory you got in the book was it 16 tons or——

A. Thirty tons. The full total was 1,000 tons to the sheet on the first one.

X Q. 39. A thousand tons?

A. Approximately. We will call it a thousand tons for a short figure.

X Q. 40. And how would those two compare is what I wanted to know?

A. On my last one there I didn't take into consideration the setting of the metal to bring it to the proper 90 degrees. I simply took it so as to determine as near as possible to

start the bend and not to bring it to past 90 degrees or the proper commercial set.

X Q. 41. Let's get what 7½ tons would be if you carried it out.

A. Multiply 7½ tons by 144 and that will give you the total.

[fol. 119] X Q. 42. That is a trifle, if I get it, over 1,000 tons?

A. That is it. So that is what I checked myself with so as to give an approximately—what we term an approximate figure. That is a variation in commercial material which may run that up considerably higher or may run it lower, and that is where our factor of safety in the building of a machine comes into effect."

The machine I used was not a testing machine. Townsend did not tell me he had made an experiment. I submitted my report as 1,000 tons required. He and I made no calculations together. I didn't figure it out with him. I took the formula from Kent's and the Machinery Handbook.

"X Q. 43. Now, let's see about your knowledge of the metal that was in that casting.

A. I have no knowledge of the metal because I did not make an analyzation of it.

X Q. 44. And you couldn't tell what kind of cast iron it was?

A. I knew it was a casting.

X Q. 45. And cast iron may vary from a very poor one under 14,000?

A. I said possibly 14,000.

X Q. 46. And there are some mixtures that go up to 40,000?

A. Absolutely, and some may go higher.

X Q. 47. How much higher?

A. We have castings that run up to 135,000 pounds, if you wish to know.

X Q. 48. And they are cast iron?

A. They are not cast iron. Anything that goes over approximately 20,000, at which we establish it, then it comes under a different analysis. We add either chemicals or we can add steel.

X Q. 49. Do you know here?

A. No, I have no knowledge whatever.

X Q. 50. Of course that would make a great deal of difference if this cast iron happened to be a quality that was better than 20,000?

A. It would——"

I did not calculate what factor of safety this machine had when it was new. That would be impossible as I had no method of knowing what its tensile strength was. I figured its safety factor when I saw it on the basis of 20,000 pounds tensile strength to a square inch at six to one, a proper factor of safety.

[fol. 120] "The Court: So far as the factor of safety goes the machine was all right.

The Witness: According to that way of figuring, it is."

The design of this machine shows it weakness in construction.

We manufacture machines, dealing only in those of our own manufacture; have bought and sold machines in the open market other than our own manufacture, possibly within the last five years; I couldn't say whether or not we bought or sold presses of the Ohl type. The last I bought or sold was around 5 or 6 tons in weight, some time during the last five years, a party to the selling of a machine of approximately 40,000 or 50,000 pounds weight during the last five years. I don't know of any sale of a press of the size and type of the Ohl press during 1926 or '27. We keep in the market so far as the fluctuations of materials go. I don't know what was paid for the press in question. I haven't kept in touch with the market on actually constructed finished presses and am not particularly interested in following the prices.

When I saw the press in question I saw there was no provision for what we call a safety device; that was perfectly apparent and it didn't take an expert to see that. So far as I can see from the plans and specifications of Exhibit 14 there is no provision for any safety device on this press.

I do not know what the material of this machine is, whether it is poor or good.

Skill is required in the adjustment and setting of the machine.

On redirect examination:

When I said the machine as I observed it at Smith's plant had a sufficient factor of safety I meant that it did assuming the stanchions were straight instead of being arched as they are. Because of the arch construction I calculated a factor of safety way below 6 to 1. I haven't any idea of how much lower it is. I possibly could figure it out; possibly a quarter less, bringing it to 4½ at the lowest. I would have to check myself up on that.

[The report referred to by the witness was then introduced as Exhibit NNN as follows:

[fol. 121] EXHIBIT NNN

"Perkins Machine Company

Arren, Mass., U. S. A., Mar. 1st, 1928.

The A. L. Smith Iron Works, Chelsea, Mass.

GENTLEMEN: The following is my report on your Ohl's press as shown the writer at your plant.

I understand that the press is guaranteed to bend ⅜" plate 12' long, therefore this report will be based on guarantee.

The power necessary to perform this work is 1,080 tons pressure.

The press has a 30 HP. motor which throu its gearing will develop approx. 1,116 tons pressure. This shows the machine has power enough behind it if the motor develops the full rated power.

Power behind the press	1,116 tons
Power necessary to form work	1,080 tons
	36 tons surplus

So much for the gearing, now the side frame of this press contains 138 sq. in. of cast iron, at section B-B as per drawing attached—which is the point of fracture. At the average tensile strength of cast iron of 20,000 lbs. to sq. in. Kent's Handbook this will give a total tensile strength of press 5,520 tons. The side frame is constructed in an arch style see sketch which applies the pressure which will vary

from 9″ to 18″ from the center of the cross section B-B. This fact Greatly Reduces the Strength of the Frame.

A press of this type should have a factor of safety of at least -6-, therefore the actual tensile strength shown for your press is 5,520 tons which will give a safety factor of but -5-. The safety factor is very low owing to the arch construction, we figured on a Solid, not an Arch which would bring the factor of safety much below the -5- mentioned above, very much below. You ask what our factor of safety is. We allow -10- and we further increase this with four heavy steel rods two for each frame placed in the castings while rods are hot. We use 3″ rods.

[fol. 122] The writer's opinion is. Your press when new could not stand up to do the work as guaranteed, in fact, would give an opinion that it would not do ¼″ plate continuously. The resistance of the side frames with a factor of safety -6- it would then be only 943.33 tons when it requires 1,080.5 to do ⅜″ plate. This alone shows that the machine was not properly designed to have a common factor of safety allowed in machines of this nature.

If there is anything further you would care to know, we will be pleased to have you call upon us.

Yours very truly, Perkins Machine Company. Fred Perkins. Fred Perkins, Pres't.''

enc. sketch.
Copy.

Smith then rested. Ohl as plaintiff in the first case then presented the following motion:

''The plaintiff moves that the defendant be required to elect whether it will proceed under its defense in this action or under its cross action being tried herewith.''

This motion the court denied and Ohl duly excepted.

Ohl as defendant in the second case then presented the following motion:

''The defendant moves that the plaintiff be required to elect whether it will proceed with this action or rely upon its defense in the cross action being tried herewith.''

This motion the court denied and Ohl duly excepted.

Without resting, Ohl as plaintiff in the first case then presented the following motion:

"The plaintiff moves that the court herein direct a verdict for the plaintiff."

Which motion the court denied and Ohl duly excepted.

Ohl as defendant in the second case without resting then presented the following motion:

[fol. 123] "The defendant moves that the court herein direct a verdict for the defendant."

Which motion the court denied and Ohl duly excepted.

JAY F. DAILEY, called by Ohl, testified as follows:

I am an attorney living in Elizabeth, N. J., admitted to practice in August of 1928; before then was an investigator. At Mr. Ohl's request I visited the plant of the A. L. Smith Iron Works in September, 1927. First saw a M[illegible] Ship, then Mr. Simpson and then Mr. Lerner. From Mr. Simpson I ordered a piece of soft steel pressed. He showed me the Ohl press. I talked with Mr. Lerner about prices. He said the machine did exceptionally fine work. Mr. Simpson was in charge of that job. That the machine at first gave trouble but that had been remedied and the machine was now doing exceptionally fine work, that they could turn the work out on that machine.

I saw Simpson direct the man who was operating the press at the time, giving him orders. I showed Simpson a diagram of the product I wanted and asked him if this machine could do that kind of work. He said it could but that I would have to see Lerner about prices. The machine was then working on six-foot lengths. I asked Simpson if the machine could make longer lengths. He took me to the yard and pointed out a pile of stringers which he said ran from twelve to fifteen feet long which this machine had turned out, saying we have a very competent workman and he does it in two operations; that I could see for myself that it was good work. I gave an order, made a $10 deposit and afterwards got this bill for the work.

[The bill, Exhibit 21 for identification, was then marked "Exhibit 21" and the track rail referred to in the bill was marked "Exhibit 23".]

On cross-examination the witness testified:

I still do some investigation. I acquaint myself with my principal difficulty concerning which the investigation is to be made and did so in this case. Ohl told me he was having trouble with the A. L. Smith Iron Company, that they com- [fol. 124] plained a flywheel or bearing got hot, that they had broken the machine in making tests or doing some work on it, that the machine wouldn't do the work. Ohl gave me some instructions; told me to get a piece of steel bent by this company on this machine. I got in touch with Ohl through his Newark attorneys. Ohl suggested that I have a piece of 11 gauge bent.

When I arrived at the Smith plant I gave them my name as Jay F. Dailey, didn't offer them my address or business or credit standing; told them why I wanted the piece bent, saying I wanted a sample piece of track; that I might want a number of them or might want them made in the thousands or might want just a single one. I wanted to do some experimenting with them. I didn't tell them I was an inventor. I was talking to Mr. Lerner at that time. I was then an investigator and not in the track business. I was lieing when I spoke about thousands of those tracks. I made a $10 deposit and arranged to have the piece of track picked up and the balance paid when complete. I did not tell them where I came from. I don't recall the appearance of the man who was operating the machine at the time; paid no special attention to the operation of the machine and the operator.

" X Q. 1. Can you give the court the slightest inkling of what this Mr. Simpson ordered this man who was operating the machine to do?

A. Mr. Simpson left me. I was standing at one end of the machine, over on the motor end of it, and the man who was operating it was on the other end putting some pieces of steel or metal into the machine. Mr. Simpson left me and went over and spoke to the other man and he turned the piece of steel over. I don't know what he said. He just

went over and spoke to the man. I wasn't listening, and I don't know as I heard that conversation.

X Q. 2. Now, have you given us the extent of the conversation between this Mr. Simpson and whoever the man was at the machine? Have you given us all that you can remember that passed between those two men?

A. Well, I would say yes.

X Q. 3. You would say yes?

A. It probably took him five or ten minutes.

[fol. 125] X Q. 4. And that is all that occurred?

A. Yes.

X Q. 5. And on the strength of that, Mr. Witness, you have told this court that you heard Mr. Simpson give orders to the man at the machine—is that the basis of your testimony?

The Court: All that testimony of what Simpson said may go out, Mr. Stenographer."

On redirect examination the witness testified:

"A. Mr. Ohl told me that he had sold a machine to the Smith Company and that after they had made some payments they wrote or advised him that there had been some trouble with one of the bearings becoming hot, and that thereafter some professors had tested the machine in some way and apparently it had broken. He wanted me to go up to Boston and find out, if I could, just where the breaks were on the housing. He gave me a blueprint on which I was to mark the respective positions on which the breaks had occurred, and have a piece of metal turned on this if it were possible, and he gave me a sample of the piece of metal, which was not of this type. He said in making bends of that type it probably would have to be with 11 gauge because there would be a number of bends in it, and have me find out the best I could with respect to the present operation of the work and the kind of repairs that had been made on the machine."

George W. Swett, called by Ohl, testified:

I graduated from Massachusetts Institute of Technology in 1923, am associate professor of machine design, have

there been a professor for fifteen years. Mr. Townsend is associated with me and is under me in that department, being my assistant.

That is my signature to Exhibit 20. We were then working for the Smith Iron Works and have not to my knowledge been employed by the Ohl Company. I have had nothing to do with the Ohl Company except through being summoned by them here today. My last work in connection with this machine was the signing of the Exhibit 20, report. I have not been asked by the Smith Company to make any further investigation or report in the matter nor has anything been brought to my attention that would cause me to make any change in that report.

[fol. 126] On cross-examination he testified:

In that report we assumed Professor Norton's figures as figures for bending plate and not for punching. So far as we were concerned Professor Norton's inquiry did not concern the punching capacity of the machine. I assumed from his report that Professor Norton arrived at his estimate of loads by laboratory experiments upon a 12-inch plate multiplied by 12. His report does not indicate that he applied any factor to accommodate that load to a load under actual working conditions. I haven't thought of the case for two and one-half years.

"X Q. 1. Should there in your opinion be some such?

A. I should want to give more thought to that than I have.

X Q. 2. You wouldn't want to express an opinion now?

A. I haven't thought of the case for two years and a half. I would want more time.

X Q. 3. And upon your answer to that last question I just put depends the accuracy of Professor Norton's statement, does it not? That is to say, if the figure should be modified to accommodate the result under actual operating conditions, then his figure would not be trustworthy?

A. No. If upon further investigation it would be necessary to apply a factor, I will apply that factor.

X Q. 4. And then his load wouldn't be——

A. His load would be the basis only."

I was summoned here by the Ohl Company not by the A. L. Smith Iron Works.

On redirect examination he testified:

I have not talked with the Smith Company from the date the report was signed until I appeared in court under summons.

"Q. 5. Let's take this Professor Norton's report. Mr. Gallagher started reading a paragraph, and I want to call your attention to this:

'This manufacturer of this press having stated that this machine was capable of or can bend steel plate 12 feet long and ⅜ths inch thick to a 90-degree angle it was decided to make tests to see how much force would be required to do this.'

[fol. 127] And that is bending?

A. I so assume.

Q. 6. 'With results as follows: For a three-eighths inch plate 12 feet long'—and then he reports with a sharp die 792,000 pounds, and with a blunt, 880,000 pounds. And those are figures for bending, aren't they?

A. Yes, sir.

Q. 7. And hasn't got anything to do with punching, has it?

A. Not those figures.

Q. 8. And those were the figures that were given you and that you used?

A. Approximately that. We used 800,000; that is a little more than one and a little less than the other."

Peter Alling, called by Ohl, by deposition testified as follows:

I am not now connected with the Ohl Company. I was in 1926, having charge of the shop, manufacturing press, all sheet metal machinery and dies. I had charge of the whole shop. I am familiar with the machine in question, a power press or power brake, 103,000 pounds, twelve foot, six inches long. I followed the making of that machine from the time the castings came in. I weighed the castings, inspected them and they looked all right. I inspected them by eye and tapped them with a hammer. They were

taken to the planing machines and drilling machines at which times castings are further inspected by me. I found no defects. When the machine was completed it was tried out in Mr. Smith's and Mr. Hovasse's presence. Hovasse was there three days at that time. Mr. Smith was not there at the final completion. He was here when the machine was run. I met Hovasse at Ohl's factory in Smith's presence, being told by Ohl that Hovasse was Smith's foreman or expert mechanic. Hovasse inspected the machine, listened to my instructions as to how it was constructed, how to adjust it in general and under different conditions, how this and that part went in to make the different adjustments, how to adjust the flywheel, etc. That was in Smith's presence. Smith wasn't there the full three days while Hovasse was there. I told Hovasse how the press ran, how to adjust the flywheel, how to bring the hammer down to a metal thickness before he made the bend of his [fol. 128] brake. Smith and Hovasse were then with me beside the press which was being completed but was not quite in actual operation. Smith told me Hovasse would stay and become more familiar with the machine and go over it thoroughly. After Smith left, with Hovasse I went into the mechanical details of the machine, showed him the different parts, different allowances for oiling and places to oil and lubricate, and how to make a positive adjustment of the clutch. Hovasse stayed until the machine was completed, fully assembled and in operation. We made samples on the machine in Hovasse's presence. Those samples were then tagged and placed where samples are kept. Exhibit P-1 is a sample made on this press on February 26, 1926 in Mr. Hovasse's presence. Exhibits P.-2A, P-2B and P-2C were made on this press in my and Mr. Hovasse's presence. These last pieces are 3/8ths of an inch thick made on a female die 2" across the corner. Exhibit P-3 was made on the same die as P-2A, B and C, of 3/8ths inch material, made in Hovasse's presence. Hovasse said nothing with respect to these samples except that the press done a first-class job and he believed it would bend half inch. I told him I thought so, but Ohl stood behind the machine for 3/8ths and that is all. When Hovasse left, the machine was erected at our plant. It was then disassembled, loaded and shipped out of the plant.

On cross-examination he testified:

I worked for Ohl two and a half years. We inspected the castings by eye, and tap them with a hammer to see if they were any blowholes under the surface not visible on eye inspection. I did a lot of this inspection. It is not infallible. There could be a blowhole in any casting not obvious on such inspection. A blowhole big enough to cause a machine to break in operation would have caused a break when we made those exhibits.

P-1 is a 10 gauge or an ⅛th of an inch thick. This steel varies in thickness commercially to the limit of ten thousandths of an inch between the "go and no go gauges." The thicker the metal the greater the stress on the machine.

Three-eighths inch steel has a slight variation although I [fol. 129] wouldn't say greater than the 10-gauge variation. P-3 was 5/16ths of an inch thick.

"X Q. 1. P-3 was what gauge?

A. P-3 was about five- sixteenths of an inch.

X Q. 2. It was a thinner metal than P-2A, P-2B and P-2C?

A. Yes, because I didn't have three-eighths thickness.

X Q. 3. You mean you didn't have it in twelve-foot lengths?

A. No. That is why I had to use three pieces there to make up the twelve-foot length.

X Q. 4. You had no three-eighths or twelve-foot length available here?

A. No, sir.

X Q. 5. And the machine, so far as your knowledge extends, was never operated upon a twelve-foot length three-eighths thickness in the presence of Mr. Hovasse or Mr. Smith?

A. Yes, sir, it was.

X Q. 6. Is that the piece of metal here on which it was operated?

A. Right there [indicating].

X Q. 7. I say a continuous twelve-foot length?

A. That is a twelve-foot length.

X Q. 8. By that you refer to Exhibits P-2A, P-2B and P-2C?

A. Yes.

X Q. 9. These last referred to exhibits are here before you?

A. Yes.

X Q. 10. Will you look at that and tell us if you observe any break in the length?

A. Yes; there are three individual pieces.

X Q. 11. I asked you whether you made a test of this machine upon a piece of metal, one piece, three-eighths inch in thickness and twelve feet long?

A. No."

In making Exhibits P-2A, B and C the greatest stress was exerted on the machine. P-3 was made at Hovasse's request, a twelve-foot length. [It is the sample made by Ohl on the square die for stringers made by Ohl for Smith.] Our standard machine was ten foot six inches long of capacity less than 3/8ths material. The housings on this machine had a wider opening than in the ten foot six standard machine. The stanchions on this machine were reinforced and made heavier. I don't think Smith was present at [fol. 130] any of these tests. During the tests the hammer required adjustments to accommodate the different thicknesses of metal to be bent. A maladjustment throws a greater stress on the machine. If the machine was set for 5/16ths and 3/8ths was put in it the clutch would slip. Unusual stresses would be thrown on the machine. We find these variances and thickness of metal commercially in this matter.

"X Q. 12. If the machine could not accommodate itself to the variance which you described before in thickness of metal, is that clear to you what I refer to?

A. Yes.

X Q. 13. The variances that I refer to, they are commercially found in the different gauges of metals; is that clear?

A. Yes.

X Q. 14. And by that you understand that I mean these variances that come in metal as it is used day in and day out?

A. Yes.

X Q. 15. Now, I repeat, if the machine could not, in ordinary operation, be readily adjusted to these variances,

you might have in some degree an unusual stress, might you not?

A. Yes."

On redirect examination he testified:

P-1 took five operations in bending it. [It is the sample made by Ohl on the five dies made for Smith by Ohl for stair raisers and treads.]

One operation takes one bend, another takes three bends, another two bends, another two bends. The stanchions in this particular machine on account of the greater opening in the housing were reinforced and made heavier.

Frederick J. Wepler, called by Ohl, testified by deposition:

I live in Short Hills, New Jersey; was employed by Ohl in 1925 and 1926 as secretary in charge of the office, and am not now connected with the company. I had to do with the preparation of the paper dated February 25, 1926. Mr. Hovasse came to test the stress on the brake, came up from the shop to the office, and I asked him how the press was, if he had tested it thoroughly and everything was satisfactory, and he said it was. I asked him if he would sign an acceptance, and he said sure I will sign an acceptance; and this is the paper he signed. Our stenographer drew it up on my dictation and Hovasse signed it in my presence.

[fol. 131] [The paper was then offered in evidence as Ohl's Exhibit No. 24, and is the same as Smith's Exhibit No. RR, excepting only that No. 24 was the original and No. RR a copy.]

On cross-examination he testified:

That he knew the circumstances under which Exhibit 24 was signed by Mr. Hovasse, but doesn't know what anyone else of the Ohl Company said to him before the witness talked with him.

Fred L. Davis, called by Ohl, testified as follows:

I am and for the last twenty years have been foundry manager of Lidgerwood Manufacturing Company, Newark,

N. J., manufacturing hoisting engines and general jobbing work in the foundry line. I have about two hundred and fifty men in the foundry department. I have been making castings for the type used in this Ohl machine for twenty years, giving practically all my time to foundry work. Ohl's order for these castings came to my attention about November 28, 1925, his number 818, our number 1775-T. This order called for pattern No. 1942, the right housing and left housing or stanchions. From these patterns the mold was made, dried, the cores put in, the mold closed and the casting poured from the cupola, of a mixture I had made up on December 9, 1925, of three different grades of pig iron machinery scrap and steel scrap, using 15 percent of steel scrap. Steel scrap denses the iron and increases the strength. A casting so made is referred to as semi-steel. Three test bars from each heat that is poured are made at the time the casting is poured. The bars made for these two castings were tested on the testing machine and the results recorded. These show the tensile strength of the mixture that went into the housings. These tests showed a tensile strength per square inch of 34,250, 31,500 and 34,000, an average of 33,250. These are for the left housing.

[The record was admitted as Exhibit 28 (submitted herewith).]

"Q. 1. Have you the right housing the same way?
A. Yes.

The Court: That I exclude. We are not interested in the right housing. I exclude it and save your exception. Go ahead.

Mr. Friedman. All right. Just to mark it for identification."

[fol. 132] [Foundry testing report marked "Plaintiff's Exhibit 29 for identification" submitted herewith.]

After the castings were made they were cleaned, chipped and a surface inspection made by looking them over, hammering and chipping them.

"Q. 2. What do you mean by hammered and chipped?
A. We usually use a big hammer for testing castings, which is common foundry practice.

Q. 3. Was anything, according to your records, found defective in that casting?

Mr. Witte: I pray your Honor'- judgment.
The Court: That I exclude and save your exception.
Mr. Friedman: I would like to take that up a little later with your Honor."

Soft grade cast iron is usually dark in color while hard iron has a lighter color and closer grain. Including 15 percent steel shows a lighter color and a closer grain. Fifteen percent steel mixture is harder to machine than common cast iron. The patterns we used for these right and left housings we received at least nineteen years ago.

"Mr. Friedman: I think that is all, except I would like to be able to talk to your Honor and convince you that I must have that question which you excluded.
The Court: I have excluded it and saved your exception. We will take a recess for ten minutes.

[Short recess.]

Mr. Friedman: Your Honor has saved my exception and excused me from making an offer of proof in this matter?
The Court: Yes."

On cross-examination the witness testified:

That the mixture for the left stanchion or housing was prepared under his formula, including Swede, Niagara and Royal Dutch Pig Iron, machine scrap and steel scrap, with 15 percent steel scrap for that mixture. The machinery scrap would be a conglomerate mixture of any large quantity of machinery scrap. Our test bars are uniformly 16 inches long, 1 inch square. They are poured at the same [fol. 133] time from the ladle of the metal in the cupola and from the same ladle an iron casting is poured.

"X Q. 4. Does the foundry ever guarantee the tensile strength and the endurance of its housings?

Mr. Friedman: Wait a minute. I don't see how that is material.
The Court: I exclude it.

X Q. 5. Did the foundry guarantee the tensile strength and the endurance of the housings in this case?

Mr. Friedman: I don't see how that is material.

The Court: That I will allow and save your exception.

A. No, sir, we don't guarantee nothing.

X Q. 6. * * * Isn't it true, however, that in such a conglomerate mixture there may be weaknesses that did not reveal themselves in the tests? Yes or no.

A. Give me that again.

[The question is read.]

Mr. Friedman: I object to the characterization of this, if your Honor please, as a conglomerate mixture.

The Court: I will allow it and save your exception. Answer yes or no.

The Witness: Yes."

This was a very heavy housing. If there were blow holes deep in the housing we couldn't find it on our inspection. There were none that I could find on our surface inspection as I have described it.

"X Q. 7. After the stanchion was completed did you then take a specimen of the cold completed stanchion by way of test,—I mean at random from the stanchion as completed?

A. A test bar from the casting?

X Q. 8. Yes.

A. We never do.

X Q. 9. I didn't ask whether you ever do or do not. I ask whether you did in this case?

A. No.

X Q. 10. When your job was completed it was not a machined job, was it?

A. No.

X Q. 11. It was rough at the ends and awaited the machining which would be done in the Ohl plant?

A. It was a rough casting.

[fol. 134] X Q. 12. A rough casting?

A. Yes.

X Q. 13. So that it would have been possible to take a chip large enough to make a test of the final product to make dead sure whether you could find a piece that would stand the tensile strength?

A. No; not practical.

X Q. 14. I am talking about possible?

A. No; can't be done.

X Q. 15. Can't be done?

A. Can't be done unless the test bar is put on to begin with.

X Q. 16. Does that look to you like the mixture that you put into that stanchion [indicating]?

A. Yes, it does; looks very good.

X Q. 17. I didn't ask you whether it looked very good or not.

A. Well, I was just telling what I thought of it.

X Q. 18. I want to identify it.

A. Yes, it looks like my iron.

Mr. Witte: May this be marked?

X Q. 19. Will you kindly identify these two as coming from the machine in question?

A. May I see the others back there?

X Q. 20. Yes.

A. They look the same to me.

Mr. Witte: Now, I ask that those be marked.

The Court: All right.

Mr. Witte: I would like to have these two marked as one and these two as one.

[Four test bars marked "Exhibits OOO-1, 2, 3, 4".]

X Q. 21. Now, assuming, Mr. Davis, as we shall prove, that this came from the stanchion that you built for Mr. Ohl, and the one in question, the Smith, what do you say as to whether that ought to have stood a tensile test of at least 25,000 pounds?

A. The tensile strength of this bar would all depend on where you took it out of the casting entirely. If it was taken from the outside of the casting where there was a skin on the casting it would test one thing. But if you took it out of the heart of a big or thick part of metal it would be another.

X Q. 22. Then am I to understand from what you say that the outer surface for some distance through is weaker than the inner portion?

A. The outer surface——

X Q. 23. Please answer yes or no.

A. The outer surface is stronger than the inner surface always.

[fol. 135] X Q. 24. The outer surface is stronger?
A. Absolutely."

"A. You are getting nearer to the actual metal by taking it out of the casting."

On redirect examination the witness testified:

"A. We never take a test bar out of a casting except in a case like this where they would take it out of a casting, but it is not foundry practice to take those bars out of any casting. It spoils a casting to take a test bar out of it, to begin with.

Q. 25. You said it was apt to test less when you took it out that way?

A. Cutting a piece of metal out of the heart of a heavy piece of metal, the grain of the iron is much coarser due to the cooling off and the annealing in the mould, whereby you make a test bar which is only one inch square, in sand, has a slight chilling effect to begin with, cools off very quickly, gives you a better strength than a test bar taken out of an average chunk of iron. Now, when we do government work——"

"Q. 26. Assuming that a test bar of this kind was taken out of a casting that had been in use—if you assume that a casting had been under a strain, would that affect its tensile strength?

A. I don't think so.

Q. 27. Would it affect—you don't think so. Suppose the machine had been stressed to the point of metal fatigue, would that affect the tensile strength of the metal?

A. Yes.

Mr. Witte: Wait a moment.

The Court: That I exclude.

Mr. Friedman: Your Honor will have in mind that Mr. Perkins testified that there had been a metal fatigue in the stanchion that broke.

The Court: He said that is what he thought was your reason for it. I exclude it and save your exception. Incidentally, I know nothing about the subject, but I suppose it might be the fact that part of the stanchion might be awfully tired and another part not. Certain parts of the body are more fatigued than others at times. I find it so sitting in court all day. It may be true of the stanchion."

With test bars taken from the casting itself it makes a great deal of difference as to the part from which the test [fol. 136] bar is taken. If the test bar is taken from the heavier part of the casting it is taken from a part where the metal is coarse and has less tensile strength,—between 4,000 and 6,000 pounds less strength. In all heavy castings the outside cools quicker and is stronger but from the surface to the center of the casting it cools proportionately slower and has lesser tensile strength. There is never uniformity among three test bars of the same pouring. The differences averages the same as the differences in this case.

On recross-examination the witness testified:

There is a big variation between test bars taken from the heart of the metal and those taken from the outer skin. The difference might vary from 4,000 to 6,000 pounds tensile strength per square inch.

Lionell S. Marks, called by Ohl, testified as follows:

I am professor of mechanical engineering at Harvard University, having taught there since 1894. Professor Norton is in my department. I am author of the Mechanical Engineers Handbook. I have read Exhibit 19, Professor Norton's report, Exhibit 20, the report of Professor Sweet and Mr. Townsend, Exhibit NNN, Mr. Perkins' report, and the stenographic report of Mr. Perkins' testimony.

I have studied the bending of steel and like materials and have studied machinery. Used testing machinery to determine the pressure necessary to bend materials. The figure 60,000 pounds used by Mr. Perkins in his testimony is the average figure for tensile strength of mild steel. By the method Mr. Perkins described in his testimony I cannot arrive at the pressure to bend 3/8ths inch soft steel twelve foot long. The force that he assumes required is the force required to tear it apart or compress it until it fractures, not the force required to bend it. There is no equality between the force required to tear a specimen apart and the force required to bend it, the bending force being much less. According to Mr. Perkins' theory it is as easy to bend a piece of 6/8ths steel of one half the length as it

is to bend 3/8ths material of full length. The figure of 60,000 pounds referred to by Mr. Perkins appears in my [fol. 137] text book on page 384. The same figure appears on page 386 of Kent's Handbook and is there used as the force required to rupture one square inch of mild steel either by tearing, tensile strength, or by compression, compressive strength, or shearing. It is one of the factors that determine the force required to bend steel but not the sole factor. It is not a proper process in determining the bending force required to multiply this figure by the length and thickness of the material. Tensile strength means the amount of force required to pull a thing apart with force.

With reference to the test made by Mr. Perkins of a piece of steel 3/8ths inch thick 1 inch wide on a machine with a 4-inch stroke back geared at 10 to 1 with a pulley and back shaft at 18 inch where a strap is placed from the pulley and weights added, determining through the weight, leverages and calculations a bending force of 7½ ton—that is an unusual and peculiar arrangement, not the normal method of determining the desired result. The kind of an arrangement that one would set up with such equipment as one had available.

In the usual testing machine the force applied is measured the same way as material is weighed, a platform scale balance and weights which are moved to determine the force applied up to a capacity of a million pounds obtaining a direct measurement of force applied to bend the specimen. In the Perkins method, instead of measuring the weight directly the weight was applied to a belt which went from a pulley, then through a small gear wheel to a large gear wheel, through an eccentric and its weight measurement is of a weight calculated through various leverages throughout the machine. That method would be accurate if there were no absorption of force in the machine's mechanism, if there were no frictions, if the gears fitted perfectly and if there were no loss of force in the transmission from the initial weight to the force finally exerted on the specimen. Those losses are indeterminate, depending on friction which is variable, and on certainty of adjustment with a percentage of error from 5 to 50 percent, depending on the machine used, its adjustment, lubrica- [fol. 138] tion, etc., with the calculated result necessarily

greater than the actual forces applied. There are no rules recognized in the profession giving a figure from which can be determined compression necessary to bend 3/8ths-inch soft steel twelve foot long or any other size. There are no ways, other than by actual experiment, of determining that force which are sufficiently accurate to be of any service.

It requires less force to bend material on rests 3 inches apart than on rests 2¼ inches apart, requiring less force for the longer distance.

On cross-examination, he testified:

I have not seen the press in question. I have not in mind having seen an Ohl press either idle or in operation. I have not studied this particular machine. If a piece is subject both to tension and bending the total tension would be increased as a result of the bending factor. If in each cross section of the stanchion the same amount of material were used then the strength of the arch construction would be less than the strength of a straight or tripod construction. I could estimate the amount of extra metal necessary to compensate for the arch construction only after having spent at least two days on a drafting board and in making calculations.

The castings used in these stanchions technically would be called heavy castings. The breaks in the stanchion shown in the sketch referred to in Mr. Perkins' Exhibit NNN are not at a cross section of the arched portion of the stanchion. The factor of safety in a machine of this type should be at least six. Six would be a minimum in any case. This factor is gained from experience. After building a number of presses and one finds that they fail, then they are built stronger and are given a bigger factor of safety. That is the way the factor of safety is generally determined.

On recross-examination he testified:

I give greater value to Professor Norton's tests than to Mr. Perkins' two results of 1,600 tons and the other of 1,000 tons, as Professor Norton's were made in my labo-[fol. 139] ratory on one of my testing machines and I know the details. I have spoken with him about it a few days ago.

"Q. 1. Is there any difference between bending and setting?

A. Certainly.

Q. 2. Do you know whether the particular specimens that Professor Norton made were both bent and set?

A. They were bent."

FRANK KINGSLAND, called by Ohl, testified as follows:

I am in the machine business in Newark, New Jersey, with Kingsland & Co., Inc., manufacturing, forming dies, shearing plates and doing maintenance of all kinds of sheet metal workers' machinery, erecting, installing and getting them into operation. I was employed by Ohl for twelve years as foreman, then as superintendent, leaving in May, 1925.

At Ohl's request I went with Ohl's counsel to the Smith plant and saw the machine in question. I met Lerner, Smith and the master mechanic. This was about November 2, 1927. Mr. Hannoch, Ohl's counsel, went to the office and I stayed in the factory looking at the press. I was introduced to Mr. Hovasse by Mr. Lerner as their master mechanic. Mr. Lerner told me that Mr. Hovasse would talk with me. The press was in operation. They were bending some angle irons on it. I saw them forming some 10-gauge plate on dies. Hovasse said they were not Ohl dies but dies they had made themselves. I have operated such a machine many times. That machine had then been repaired by means of straps, bolts, etc. There seemed to be no difficulty in operating the machine. They didn't seem to have any difficulty in turning out the work. Nobody spoke about any difficulty with turning out work. We left the factory and went to Mr. Witte's office, meeting Mr. Smith there. Smith said that he thought there should have been a pin safety stop on the press. I told him I was familiar with all of the makes of presses of this character and none of them had such a safety device as he spoke of; that if the clutch was adjusted too tightly I could put a piece of paper between the dies and break any one of these [fol. 140] presses. If this press is adjusted so as not to leave sufficient clearance and the power put on the press instead of being able to move it would snap or break a

greater than the actual forces applied. There are no rules recognized in the profession giving a figure from which can be determined compression necessary to bend 3/8ths-inch soft steel twelve foot long or any other size. There are no ways, other than by actual experiment, of determining that force which are sufficiently accurate to be of any service.

It requires less force to bend material on rests 3 inches apart than on rests 2¼ inches apart, requiring less force for the longer distance.

On cross-examination, he testified:

I have not seen the press in question. I have not in mind having seen an Ohl press either idle or in operation. I have not studied this particular machine. If a piece is subject both to tension and bending the total tension would be increased as a result of the bending factor. If in each cross section of the stanchion the same amount of material were used then the strength of the arch construction would be less than the strength of a straight or tripod construction. I could estimate the amount of extra metal necessary to compensate for the arch construction only after having spent at least two days on a drafting board and in making calculations.

The castings used in these stanchions technically would be called heavy castings. The breaks in the stanchion shown in the sketch referred to in Mr. Perkins' Exhibit NNN are not at a cross section of the arched portion of the stanchion. The factor of safety in a machine of this type should be at least six. Six would be a minimum in any case. This factor is gained from experience. After building a number of presses and one finds that they fail, then they are built stronger and are given a bigger factor of safety. That is the way the factor of safety is generally determined.

On recross-examination he testified:

I give greater value to Professor Norton's tests than to Mr. Perkins' two results of 1,600 tons and the other of 1,000 tons, as Professor Norton's were made in my labo- [fol. 139] ratory on one of my testing machines and I know the details. I have spoken with him about it a few days ago.

"Q. 1. Is there any difference between bending and setting?

A. Certainly.

Q. 2. Do you know whether the particular specimens that Professor Norton made were both bent and set?

A. They were bent."

FRANK KINGSLAND, called by Ohl, testified as follows:

I am in the machine business in Newark, New Jersey, with Kingsland & Co., Inc., manufacturing, forming dies, shearing plates and doing maintenance of all kinds of sheet metal workers' machinery, erecting, installing and getting them into operation. I was employed by Ohl for twelve years as foreman, then as superintendent, leaving in May, 1925.

At Ohl's request I went with Ohl's counsel to the Smith plant and saw the machine in question. I met Lerner, Smith and the master mechanic. This was about November 2, 1927. Mr. Hannoch, Ohl's counsel, went to the office and I stayed in the factory looking at the press. I was introduced to Mr. Hovasse by Mr. Lerner as their master mechanic. Mr. Lerner told me that Mr. Hovasse would talk with me. The press was in operation. They were bending some angle irons on it. I saw them forming some 10-gauge plate on dies. Hovasse said they were not Ohl dies but dies they had made themselves. I have operated such a machine many times. That machine had then been repaired by means of straps, bolts, etc. There seemed to be no difficulty in operating the machine. They didn't seem to have any difficulty in turning out the work. Nobody spoke about any difficulty with turning out work. We left the factory and went to Mr. Witte's office, meeting Mr. Smith there. Smith said that he thought there should have been a pin safety stop on the press. I told him I was familiar with all of the makes of presses of this character and none of them had such a safety device as he spoke of; that if the clutch was adjusted too tightly I could put a piece of paper between the dies and break any one of these [fol. 140] presses. If this press is adjusted so as not to leave sufficient clearance and the power put on the press instead of being able to move it would snap or break a

housing or break the bed. I don't know just where it would break. Something would have to break or the motor might burn out. Some particular point would have to give. This would happen by failing to leave the right amount of clearance between the dies and have the clutch adjusted so tight that it wouldn't slip.

I have had nineteen years' experience in bending metal, have bent 3/8ths-inch soft steel, have made elongation and tensile strength tests when I was with the Crucible Company of America. I have made tests to determine the pressure required to bend 3/8ths-inch soft steel on 3-inch dies. It takes less pressure to bend on a 3-inch than it does on a 2½-inch die. I have made these tests on 2½-inch dies, 1½-inch and 3-inch, all different sizes. At counsel's request yesterday I made a test on a die 3 inches across the corners on 3/8ths-inch stock 1 inch wide on an Olsen testing machine. It took 4,776 pounds to form that piece to a 90-degree angle. That equals 686,000 pounds or 343 ton for a twelve-foot length, on a 3-inch die. A smaller die would have required more pressure.

The machine in question I saw at the Smith factory looked like the Ohl standard 103,000 pound power brake or press. I am familiar with the clutch device on this machine. In forming work on this machine I release the clutch so that it will just about drag and slide. I make every bend it will make in the sheet, and if the bends are not right I tighten up the adjusting screws of the clutch a little more until I get the piece formed in the shape I want it. I then leave the clutch at that adjustment and proceed with the balance of my sheets. If the clutch were properly adjusted and the operator had not allowed sufficient clearance between his dies, nothing would happen except that the clutch would slip, the arm would stop and the operator would have to adjust the clutch to start up again. The machine would automatically stop, the flywheel would keep on coasting but it would not carry the machine with it.

[fol. 141] "Q. 1. Do you know what the cost is of a new stanchion, such as you saw on that Smith press?

Mr. Witte: I pray your Honor's judgment.

A. If you will give me a couple of minutes.

Q. 2. Wait a minute. In 1925.

The Court: What is the question? The cost of it?

Mr. Friedman: Price of it, I think I said.

Mr. Witte: I pray your Honor's judgment. We were not buying stanchions. We were buying an entire machine.

Mr. Friedman: Yes; but your Honor has in mind this question: That one stanchion broke, and I suggest the price of replacing that stanchion is an element that is properly to be considered here.

The Court: That I exclude and save your exception.

Mr. Friedman: Will your Honor hear me a minute on that?

The Court: No.

Mr. Friedman: And I take it, in accordance with your Honor's suggestion the other day, in the way you exclude evidence, you do not require any offer of proof?

The Court: No, sir.

On cross-examination the witness testified:

I saw the man operating the machine at Smith's plant for a short period: saw two or three bends made from it in my presence. The operator had the dies set before I arrived. On the particular bends he was making he had no reason to change it after he had it once set. I could find no fault with the operator's operation of the machine from what I saw. I didn't examine the setting of the clutch and don't know how tight the operator had it. It doesn't make any difference how tight the clutch is set so long as enough clearance between the dies is allowed for the metal. In bending for example ¼-inch stock to allow for variation in its thickness we open up the clutch before we start to form the stock and then keep adjusting the clutch tighter and tighter until we find it forms the stock in a 90-degree shape or the desired angle, and then we hold the clutch in. If you then put in a piece thicker than a ¼-inch, bringing the hammer down, it would go just so far then the flywheel would slip around the clutch. [fol. 142] Every press turned out of the Ohl factory while I was there was tested up to capacity of the press. If it were required to bend 3/8ths-inch soft steel on 3-inch square dies I would put in a twelve-foot piece of

stock or its equivalent. If I had a twelve-foot piece I would put it in. If not, I would put in two six-foot pieces with practically the same result, the variation being so slight that you could not figure it out.

In the test I made yesterday I bent the specimen to 90 degrees. The shape is set. The metal is not set. For commercial operations we would not have to go further and set the metal. Setting the metal would require additional pressure.

"X Q. 3. How much additional pressure?

A. I don't know.

X Q. 4. I mean in proportion?

A. You can put it up anywheres the sky would be the limit, until you squash the metal; that is all there would be to it.

X Q. 5. Oh, no. You know there is a difference between bending and setting, don't you?

A. Absolutely.

X Q. 6. You heard Professor Marks make that distinction?

A. Yes, sir; there is a big distinction.

X Q. 7. And how big a distinction is there for ordinary commercial purposes now between bending and setting?

A. I have never seen any setting in commercial work. I have seen only bending.

X Q. 8. You have only seen bending?

A. Yes.

X Q. 9. That is to say, if there is a round turn to the product that is sufficient to satisfy the commercial requirements?

A. Yes.

X Q. 10. Even though your die is sharp cornered?

A. Even though your die is sharp cornered; you must have a radius equal to the thickness of the metal.

X Q. 11. So that you don't care particularly, from your understanding of commercial setting, whether it is set absolutely sharp or not—sharp cornered or not?

A. No.

X Q. 12. But if it had to be set sharp cornered it would require additional pressure?

A. It would, absolutely.

In my test I used a round nose die. On my figures to [fol. 143] bend a foot specimen it takes twelve times as much as for an inch specimen or 57,192 pounds; multiply that by 12 you get the pressure for a twelve foot specimen.

EMIL W. KOLARSY, called by Ohl, testified:

I am in the automobile business in Newark, formerly employed by Ohl, leaving them in 1926; I was superintendent. I visited the Smith plant September 1st, 1926. I met Mr. Lerner, who took me to the shop, introduced me to Hovasse, and they showed me the press. It was not in operation. The flywheel shaft assembly was disassembled. The whole clutch assembly was practically down. I saw the 16-inch bushing and noticed it was marked up where it revolved in the drum and the inside was burred up and blue, indicating that it had run hot. I noticed that they had turned eccentrics in the bushing and drilled holes in it. They claimed that the bushing had turned and sheared off the set screws holding it in the frame. That it wasn't getting any oil; that they had drilled oil holes and were going to put in feed cups and put the bushing back. I saw the shaft and pointed out to them where it was burred and shown evidence of running hot. I told them the conditions looked as though there had been a lack of oil. They showed me the brake pulley hub that was broken. Hovasse said the Boston Engineering Company in disassembling the clutch drove the shaft the wrong way and broke the hub of the brake pulley. They showed me broken retainer rings which showed that it had chewed because it was not lubricated and rings were cut out of it and it broke. They complained about no other part of the machine to me. They said something about the pieces coming out bowed. I told them that was due to the differences in the stock, the springiness. I don't remember any complaint about the dies. That is all I remember they said to me. I had not seen this particular press in operation but had seen others at the Ohl plant and had tested them in operation. In my opinion the troubles I saw at the Smith plant were due to insufficient oil. Running hot indicates a lack of lubrication. The burring I

noticed indicated the bearing had froze on the shaft, sheared [fol. 144] off the screws and revolved in the housing, all due to improper oil or lack of lubrication.

On cross-examination the witness testified:

This 16-inch bushing does not now have the appearance it had when it left the Ohl factory or as ordinarily made. It has eccentrics turned in and additional oil holes. The blow holes in the broken hub pulley don't amount to anything in that particular pulley and would not be an adequate cause for the breaking of it.

The blow hole in the right stanchion is where the 16-inch bushing fits in. That would not affect the bushing in any way. At the Smith plant I put a level on the machine. The machine was level. I don't remember whether there was or not any clearance under the bed of the machine at that time. The springiness or bowing as a general rule comes in the center of the product. This comes through the different thicknesses of the metal and the different hardness and the spring in the machine itself in any machine of that kind, which may be in the bed or it may be in the hammer of the machine.

"Q. 1. I know, but how much deflection do you think there is?

A. Well, it all depends on what you are bending and how tight you set it down.

Q. 2. How much of a deflection should there be?

A. Nobody has ever been able to tell that yet.

Q. 3. How much deflection do you think there ought to be in order to have the machine perfect?

A. There is no such thing as a perfect machine.

Q. 4. In other words, if there is a deflection it is not a perfect machine?

A. No, sir; you can't build one perfect.

Q. 5. I am asking you, if there is a deflection, it is not a perfect machine; is that correct?

A. No. It is a commercially perfect machine, I would say."

A sixteenth of an inch deflection in a machine is allowable. There is liable to be from a sixteenth to an eighth of an inch bowing, all depending on the metal.

On redirect examination the witness testified:

I had nothing to do at Ohl's plant with this machine as it [fol. 145] was shipped when I was not employed there. As this machine was built, there was an oil hole drilled through the frame lined up with an oil hole in the bushing and a plug on top of the hole in the frame. In oiling the machine you have to take the plug out and pour in the oil and if the oil was poured in there was no place for it to go except into the bushing. The oil hole is drilled in the frame, then the bushing is put in and then the oil hole is drilled through the frame so that the holes in the bushing and frame must line up. The blow hole in the right stanchion would be immediately apparent on removal of the 16-inch bushing.

George A. Ohl, called by the Ohl Company, testified as follows:

I am president and treasurer and sole stockholder of the Ohl Company. We manufacture twenty-six different kinds of machines for stamping, rolling and cutting sheet metal products from the thinner material up to half inch thick and from three foot long to twelve foot six inches long. I went with the company in 1879, my father operating the company before then. I have worked in all branches of the business, in construction and design. We have built thirty-four or thirty-five twelve foot six inch 103,000 pound press- and possibly 2,000 of the other types and capacities. We have built presses up to 212,000 pounds twelve foot six inches long. I personally go through the factory two or three times in the afternoon to look over work in process, generally with the foreman. I observe in general how things are as I go through, spending about one and a half hours a day in the office, the rest in the shop on the mechanical end. I saw the press in question every day during its construction.

On November 5, 1915, Smith phoned me from New York. I made a memorandum of what he said.

"A. He said he wanted to buy a press. I asked him what line of business he was in and he mentioned making stair risers. I started to tell him which was the proper

press to have and he told me over the phone that he knows all about the Ohl press, and he would like to know if he could come over tomorrow, which I think was November 6, 1925, and I told him I would be in all day."

[fol. 146] Smith came the next day in the morning with Mr. Hovasse. Smith told me Hovasse was the master mechanic. I showed him a ten foot six inch press we were getting ready to ship to Japan, that was running.

"Q. 1. What took place then?

A. I asked Mr. Smith if he had used heavy material, I wanted to get something to correspond. He told me he was making stringers and the heaviest material he would ever use was one-quarter inch soft steel. I said the proper machine for you to use is 68,000 10-foot press that we are furnishing some 15 or 18 concerns, the largest in the country in your line, and some of them with the larger opening, if you want to make longer stringers. He said: 'All right.' I said: 'We can give you a 28-inch opening w-ich is standard or a 40-inch opening which is also standard, depending upon the line of business you are in."

He said: "I think we have to have a bigger press." I said: "You don't need to spend that money. The press down stairs we saw yesterday"—No, that is the same day, the second time—I said: "—is plenty big enough. That bends 5-sixteenths steel with dies 2¼ across the corner." He said he would find it out later. I gave him the address of S. R. Lemcke, a firm in New York City, doing the same work as his, to go over there and look it over, and he said he would. He said he wanted the biggest press in Boston. I said: "I have big presses in Boston, 17 of this type, not the same weight." And he telephoned from New York he had called on some firm and he told me to send the blueprints and specifications and everything else pertaining to this press, that he wanted a 12-foot 6,103,000-pound press.

He spoke to me about dies at that time. We have made dies for over fifty years. I designed the dies he had because he didn't know how to make the product. I have designed dies, plan-ed them, experimented with them, put them in the press and formed metal, have stopped at plants and told them how to put in the metal; how to leave clearance, etc.

After I got Smith's order I ordered the castings from the Lidgerwood Foundry Company, with whom we had done

[fol. 147] business for twenty years, under our order No. 818, on November 25, 1925. Subsequently we received the castings from Lidgerwood. The right and left housings were made from pattern No. 1942. The housing that broke on the Smith machine is the left housing.

I first heard from Smith by his telephone call in November, 1925. He came the next day and we had a lengthy conversation about different matters which I confirmed by letter.

"Q. 2. Now, what was it that you talked about with reference to this sort of a press?

Mr. Witte: If the court please? I assume the contract having been made—a formal written contract,—everything that precedes it, so far as the making of the contract is merged in it.

Mr. Friedman: That was my first point, your Honor, and you ruled against me and let in all this testimony of Mr. Smith. My contention was that it was a written contract, and all this didn't have any bearing, but your Honor overruled it.

The Court: All right. Go ahead. I will save your exception."

Smith and Hovasse called; I showed them a press of 88,000 pounds ready to be shipped to Japan. Told them it was used throughout the United States and Canada for stringers and stair treads; that the only exception was that Sexhauer & Lempke ordered a larger opening in the housing so they could make 30-foot stringers in one, two, three and four operations where some of the bends required that greater width. Where we make big openings we strengthen the pattern. I recommended that he go over there to see it operate. The machine that I showed him had the 25-inch friction clutch as a safety device, and no other. That was the same that was on the machine we delivered Smith. Smith asked me to send him blueprints and specifications, foundation plans and details showing dies we make to form bends. He spoke about getting prices in Boston. I told him our factory had one price and we allowed no commission. He said he would take care of the commission. Two days after the telephone conversation I sent to Smith the November 9th letter, Exhibit B. That was the only address

he gave me. With that letter I enclosed the specifications and blueprints of Exhibit 14. Somewhere between the 18th [fol. 148] and the 24th of November he called and talked with me about terms and wanted me to buy the motor for him. Then I got Exhibit B from him, the letter of November 24th. Then I got Lerner's November 25th letter, Exhibit 16-A.

I saw the stanchions or housings when they came in from the foundry, when they were weighed up and the weights checked. Then I saw our superintendent, Alling, test them with a hammer and listen for a hollow sound indicating a blow hole or shrinkage. I saw the castings as taken from the scales and put on the planer and after that in the boring mill. I saw them planed and milled and bored. The rough castings as they came in were of a light blue gray color or color of semi-steel as contrasted with cast iron which is dark or black in color. We had ordered a semi-steel casting as we had been ordering them for twenty years for our different presses. In planing a semi-steel casting you find bright gray, whereas with an ordinary casting of 18 to 20 foot tensile strength you find a more open grain. Semi-steel has a tensile strength of 34,000 to 40,000 pounds as compared with ordinary cast iron of 18 through 20.

When the Smith press was about ready I wrote him that I wanted to use his press to test out twelve or fifteen sets of dies for some Canadian people. This was about a week before Hovasse called. (Exhibit T.)

The 25-inch diameter friction clutch is a safety device, the best known in mechanics among positive clutches. When the clutch and dies are adjusted for a given thickness of metal and the die adjustment is not right for the thickness of the metal this clutch when the machine is operated will slip. It will slip on an over-load and shuts off the application of power to the press although the motor flywheel may continue in operation. On the Smith press the lower or female die rested on a high beam and not on the bed of the press. The opening between the top of the bed and the bottom of the hammer is 13 inches on the Smith press. By using a die holder or eye beam the lower die sets in the holder and raises it up toward the hammer so that the dies don't have to be so heavy and thick.

[fol. 149] We generally allow on these presses a sixteenth of an inch clearance in the center of the bed for an ad-

ditional safety factor in case the machine isn't properly adjusted.

In adjusting the machine we first put in a piece of scrap material, bring down the hammer and see if the piece of scrap is loose. If there is no loose motion in the scrap you rest the hammer, put in the material on the dies, bring down the hammer, and if the 25-inch friction clutch slips then the mechanic tightens it up a little, brings down the hammer again, and if the clutch slips again tightens it up a little bit more. That is the trial and error method and depends wholly on the operator. Smith and Hovasse came to our plant February 23d. In the November visit Smith had introduced Hovasse to me as his master mechanic. On February 23d we went down to this machine in the erection shop and I think we made some stair riser samples. I was in and about the factory four or five times that morning; saw Alling instructing Hovasse; was in four or five times in the afternoon and stood there quite a while watching Alling instruct Hovasse. I didn't see any accident or any jamming of the machine. It was in running order and I had tested out a lot of dies on it four or five days before for the United States Government and some Canadian firm. I saw these tests, possibly twelve or fifteen. Some of these dies made three or four bends in one operation. Three bends on one piece of metal at the same time on dies with a 3-inch leverage for each bend requires three times the power to make one bend at a time. If the distance between the bends in one piece were one-half inch from the first to the second and an inch from the second to the third and one-half inch to the third bend, it takes four times the strain than you would get on 3/8ths-inch metal on one bend. On Exhibit P-1 (the stair riser) three bends are made in the third operation. To make these three bends in one operation on 10-gauge soft steel requires three times the pressure to make the three bends separately on 1/8th-inch soft steel assuming the same width of the female die.

I saw our superintendent, Alling, in front of the press in question instructing Hovasse on oiling it and adjusting the [fol. 150] 25-inch friction clutch. Hovasse said he was pleased with the press and I went up and wrote out this letter for the girl to type which Hovasse later signed. I had asked him whether he had received all instructions and if he was satisfied. He said he was pleased with every-

thing. I went upstairs and gave the form for him to sign to Wepler, our office man.

After that the machine was shipped and we received the notes and the contract. Some of the notes were paid. The next thing we heard was this letter of June 25, Exhibit CC.

"Q. 3. When you received that letter could you tell what they were complaining about in your machine?

Mr. Witte: Wait a minute.

The Court: That I exclude.

Mr. Friedman: I offer to show your Honor that the letter was not such as to furnish him with any idea of what they were complaining about.

The Court: I will exclude it and save your exception.

Q. 4. Up to that time, had you ever heard from them of any complaint about any parts of your machine other than the flywheel bearings and disc in this letter of June 25?

A. No, sir."

It takes pretty near double the pressure to bend 3/8ths soft steel across a 2¼-inch die than it takes on a 3-inch die.

The press we delivered to Smith conformed with the specifications and blueprints which we submitted him and so did the dies.

"Q. 5. And were they adapted to the work for which they were designed?

Mr. Witte: I pray your Honor's judgment?

The Court: That I exclude.

Mr. Friedman: I will have an exception, your Honor?

The Court: Sure."

I saw the tests on this press on dies referred to in my letter of February 13 (Exhibit T) to Smith, doing part of the work myself. Some of the dies had five bends in them. I observed that the press was working properly. This was through a period of four to six hours a day operation on these dies in this press. There was no trouble with any of the bearings. After these tests Hovasse and Smith came [fol. 151] down and the press was operated in my presence and theirs. The first day Hovasse was there we tested the dies and made the tread and riser samples. The next day

we formed some heavier material, 3/8ths on 2-inch dies as we didn't have any 3-inch dies.

If the machine were operated with the hammer and friction clutch not properly adjusted some part of the machine would break. If you haven't left enough room between the dies for the thickness of metal being used then unless the 25-inch friction clutch is properly set so that it will slip on excess strains something will break in operation of the press.

The 25-inch clutch has wooden inserts which grab the ring on the flywheel when the power is applied through the foot treadle. When you take your foot off the treadle the clutch springs pull the clutch cheeks away from the flywheel and disengages. If the clutch is properly adjusted for the work intended to be done on the machine it will slip if a piece of metal is used thicker than the adjustment. It will not slip if lighter work is used than the adjustment intended. That is the safety device for that machine and when it slips the flywheel continues to run but the hammer stops, the power is disengaged.

Mr. Perkins' testimony referred to the gears on this machine being off pitch. If they were the machine could not run without a rumbling, sharp metallic noise and the gear teeth themselves would be marked. If the shafts were out of alignment there would be a binding, the bearings would not work properly; they would get hot from extra friction. We generally have three holes in the bed to put the hoisting chains through in handling the piece and one in the hammer. These holes strengthen instead of weaken the casting as they give a greater cooling surface, having a greater tensile strength.

The machine should be placed directly on the foundation with a 1/16-inch clearance under the bed as an additional safety factor in case the clutch is not properly adjusted and thicker material is used than the adjustment is set for. If the bed rests solid on the foundation then the bed cannot [fol. 152] spring. Both housings would lift in the air when stress is applied on the machine.

In operation of the press the flywheel runs continuously. A foot treadle engages the 25-inch clutch and transmits the power to the machine. If there is too much strain on the machine the clutch slips. When you take your foot off the

pedal the brake operates on the flywheel shaft and stops its revolving. We make the hammer adjustment by power and for fine adjustments by hand. We can regulate the press to a thousandth of an inch by hand adjustment. The blow hole in the right housing where the 16-inch bushing goes is apparent when the bushing is removed. The machine in all respects complied with the specifications and blueprints submitted, so did the dies. I have had over forty years experience in my own plant and others in bending plate up to one-half inch thick cold rolled steel twelve foot six inches long. Cold rolled steel is harder to bend than soft steel. I observed what has been referred to as bowing. The first bend made in any sheet from 1/8th to 1/2 inch thick will bow under any machine that was ever made because the steel has hard and soft spots in it and varies in thickness. Sometimes you have to straighten it by hand or put flattening dies in the machine. When the second bend is made in the same plate the second bend probably will be all right.

Photographs of Exhibit 14 show the arch construction of the housing as used on the Smith press. We had been building such stanchions with the same size opening for twenty years.

Those stanchions were made from our standard pattern for this line of work. Where the stanchion is arched or bowed more metal is used than in the area where it is straight, making it stronger. The repairs made on this stanchion were not proper. In my opinion it should have been electro-welded. The stanchion could have been electro-welded without dismantling the machine in about three days' time at about $200 cost. A new housing would cost $860 f. o. b. Newark with $60 freight to Boston.

On cross-examination George A. Ohl testified that the deflection was not the sinking of the bed of the machine, [fol. 153] such sinking being known as springing. This bowing of metal does not result from springing but from imperfection in the metal. Bowing of metal bent by the Ohl machine in question results from imperfection of the metal itself and not from deflection. In his letter of August 26, 1926 (Exhibit LL) he said: "Referring to deflection, there is no machine of this type made which will not deflect in the center and we never guaranteed there would be no de-

flection." He testified that he meant by this statement that it was possible to deflect with his machine if it was maladjusted, and did not refer to his machine operating under ordinary conditions. What he meant to say was that he did guarantee the machine against deflection in proper use but did not guarantee it if it was used in an operation which it was not intended for. The letter last referred to (Exhibit LL) was in reply to Exhibit II, a letter from Mr. Witte (then acting as counsel for the Smith Company) to Mr. Shannon, of counsel for Ohl, complaining that the machine would not bend 3/8 metal without a deflection, and further pointing out the need of man power after each operation to recover the metal from deflection. In reference to the latter letter the witness testified as follows:

"X Q. 6. And he (referring to Mr. Witte, the writer of the letter) meant to say by that that after each normal operation there had to be man power to recover the metal?

A. Not machine power, man power.

X Q. 7. That is true?

A. Yes, sir; that is the only way to get those bowings out.

X Q. 8. So your machine did bow the material, didn't it?

A. No, it didn't at my factory. The machine didn't bow it, I repeat again. It is the action of the material that brings the bow in.

X Q. 9. Deflection relates to the machines, doesn't it?

A. Yes.

X Q. 10. Your machine does deflect, doesn't it?

A. I could deflect any machine we ever made.

The Court: Mr. Witte uses deflection there apparently in what we call bowing. I don't take that as meaning anything to do with the machine but with the product.

Mr. Gallagher: That is why, your Honor, that I asked this [fol. 154] witness whether deflection properly referred to the machine, and his letter shows, Exhibit LL, that he so used it, because he said, referring to deflection, 'there is no machine of this type made which will not deflect in the center.'

The Court: What Witte said was when turning out one of these things it deflects or is deflected, meaning the product and not the machine.

Mr. Gallagher: That is true, your Honor. Mr. Witte did not use it in its proper sense, but you understood what Mr. Witte meant, didn't you?

The Witness: Just as his Honor tells you.

X Q. 11. You understood Mr. Witte meant when they bend 3/8-inch metal there had to be man power after each operation to recover.

The Court: He said so now and he always said, Mr. Gallagher, that that always happened in the first bend of any piece of steel. The second bend may be all right but the first bend is always bowed.

The Witness: Steel of this kind.

The Court: Steel of this kind.

Mr. Gallagher: That is not my point, your Honor. He said to you that that resulted from the construction of the steel.

The Court: Surely. He says so. He says the machine is all right. It is the cussedness of the nature of the steel that it won't bend straight, always bows.

Mr. Gallagher: He said in his letter, however, that it is the machine."

Mr. Ohl further testified that there was not any deflection in his machine when it was shipped; that he was present in court when Mr. Kolarsey testified as follows:

"X Q. 12. How much deflection should there be?

A. Nobody has been able to tell that yet."

And this testimony the witness recalled. The witness then testified as follows:

"X Q. 13. What do you say, how much deflection should there be?

A. It depended on what pressure you put down, and what [fol. 155] rule or stick you mark to measure, and make another mark and measure it."

He said there should not be any deflection in the machine unless an extra strain was put on it, and his machine in operation under a reasonably prudent, careful workman should show no deflection.

"X Q. 14. Do you recall this testimony of Mr. Kolarsey: 'There is a certain amount of spring in the machine, in any machine.' Is that your opinion?

A. If overstrained, yes, sir; any machine ever made——

X Q. 15. No; but in ordinary commercial operation.

A. If you put beyond its capacity, yes.

X Q. 16. Up to its capacity?

A. No deflection.

X Q. 17. No deflection at all? So that you would not say that 1/16 of an inch was an allowable deflection in a machine properly operated below its capacity?

A. It is a factor of safety only."

He recalled his testimony on direct examination that at the time of the so-called test when Hovasse was standing in front of the press receiving instructions from Alling, he saw the former bend down over the bed and measure the deflection with Alling, and the result was that 'it showed 1/16 of an inch, that Alling proved to Hovasse that there was some deflection in the machine, that he overstrained it.'

X Q. 18. That was in the Smith machine?

A. Yes, sir.

X Q. 19. Was the machine overstrained down in your plant?

A. Yes, and I can overstrain it a quarter of an inch more without breaking it.

X Q. 20. We will come to that later. Now, what type of material was being used at the time you overstrained that machine down in your shop?

A. Bending first 'the stairsteps, or the risers, that was No. 11 gauge 1/8 of an inch thick, three bends in the one operation of dies that would not aggregate an inch and 11/16 across the corner, three bends.'

X Q. 21. And that was done purposely, you say, to overstrain the machine?

A. That was done to show him how to make the three bends before he had the clutch and the hammer properly adjusted.

[fol. 156] X Q. 22. Just one question about that now to sum up. Neither the clutch nor the hammer were properly adjusted at that time, and that was done purposely to put a load on the machine to show the deflection?

A. It was done to explain to Mr. Hovasse the different things that could happen on this machine.

X Q. 23. You did not expect this machine in ordinary operation to stall, did you?

A. No.

X Q. 24. And if it did stall that would show that the clutch was not properly adjusted, wouldn't it?

A. Yes, sir.

X Q. 25. And the remedy for that would be to readjust the clutch properly, wouldn't it?

A. Properly adjust the clutch and the hammer.

X Q. 26. Well, let us see what you said about the clutch here, if anything, in your directions.

A. Yes, sir."

These directions (Exhibit X) for setting up the press were typed by the Ohl Company and sent with the Smith machine.

"X Q. 27. In the first place, you say, 'In case the workman jams the press'—you did anticipate it might jam, didn't you?

A. I have seen them jam.

X Q. 28. I asked you a moment ago if you expected the press to jam or stall.

A. No, not when properly run.

X Q. 29. Then you did expect it to stall?

A. When a mistake was made.

X Q. 30. 'Through failure to allow clearance for the material between the dies.' That is down here, isn't it [indicating]?

A. Yes, sir.

X Q. 31. 'Or through faulty adjustment of the slide or hammer.' That is here [indicating]?

A. Yes, sir.

X Q. 32. 'He'—referring to the workman—'should use the starting bar in the starting collar C'?

A. There. It is put there a purpose when they jam.

X Q. 33. 'To reverse the rotation of the eccentric shaft'; that is to make the machine back water, so to speak?

A. Back it up.

X Q. 34. 'Thus taking off the pressure.' That means down here [indicating]?

A. Yes, sir; between the dies.

X Q. 35. 'Before adjusting or raising the slide or ham-
[fol. 157] mer No. 3. When using the starting bar the operator should never put his foot on the foot treadle.'

A. Correct.

X Q. 36. Now, have you said a word about adjusting the clutch.

A. Yes; properly adjust the hammer for clearance.

X Q. 37. About the clutch, sir?

A. Yes.

X Q. 38. Have you said a word about that?

A. Properly adjust the hammer. It means also the proper setting of the clutch.

X Q. 39. I thought we agreed that the hammer adjustment and the clutch adjustment were two different things.

A. They are both different, but they pertain to bending operations, but not putting the power on.

X Q. 40. The adjustment of the hammer is for the purpose of spacing the distance between the two dies properly?

A. Yes, sir.

X Q. 41. The clutch adjustment is for the purpose of so regulating the power that it will shut off if an overload is imposed?

A. Adjust it.

X Q. 42. Is that true?

A. No, sir. Yes, it is true; that is, it shuts off if overloaded,—true.

X Q. 43. Let me see if I can explain it, because I haven't your learning about it. You have the power here, and you have the machine here [indicating]?

A. Yes, sir.

X Q. 44. Now, in order to connect the two the clutch must go in that flywheel?

A. Yes, sir.

X Q. 45. Must connect with it; must come in contact with it?

A. Must come in contact with it.

X Q. 46. Now the point is that if that clutch is adjusted properly and an overload is imposed the clutch will release?

A. Yes, sir.

X Q. 47. That is the point you make?

A. Yes, sir.

X Q. 48. The purpose of the clutch then is to relieve the machine in case of overload?

A. Yes, sir."

This witness testified that if the clutch came in contact and an overload was applied at the hammers then the power would throw that entire overload onto the machine. His clutch was the safety device. The machine would not be a proper machine if it had a claw clutch or an open clutch, or any positive clutch.

[fol. 158] "X Q. 49. And if it did not have some safety device, in this case a peculiarly adapted clutch, it would not be a proper machine?

A. Yes, just the same."

That if enough clearance was not left between the dies an overload would result unless the clutch adjustment was made so as to slip upon the imposition of the overload, thus disconnecting the power from the hammers. A jamming or stalling resulted from an overload.

"X Q. 50. Now, I ask why you did not suggest in your printed directions that the proper way to relieve a machine from jamming was to make this clutch adjustment? Is the question clear to you?

A. Not with a machine that we ship out, but we have got to tell them to see that the parts don't get loose, that they be properly oiled, and to see that the belts are tightened up and that they won't slip, or any other parts of the machine."

The witness testified that if the clutch adjustment was made in the way he had described that no harm could come to the machine.

"X Q. 51. But you did not suggest in your directions a method that would prevent harm coming to a machine, did you?

A. We did.

X Q. 52. Did you suggest the clutch adjustment method?

A. Yes, sir. We showed Mr. Hovasse just exactly how to adjust that clutch from the beginning of putting a piece in until we came down——

X Q. 53. I referred to your instructions, Exhibit X—your typewritten instructions that you sent to your customers."

The witness was then asked to point out where on the typewritten instructions, Exhibit X, any reference was made to clutch adjustment, and he pointed out paragraph 6 and read what he said was the pertinent part as follows: "In case the workman jams the press through failure of allowing sufficient clearance for the metal between the dies, or through faulty adjustment of the slide or hammer", explaining that the adjustment of the slide or hammer included the adjustment of the mechanism just as well as the hammer. He also pointed out the portion of the directions reading: "The fly wheel, friction disc, brake pulley [fol. 159] and clutch have been shipped assembled", which he said meant that when shipped the clutch was in a proper position to slip when the press was overloaded unless the one receiving the shipment changed the adjustment, because the clutch as shipped was all assembled in one unit.

In reading the directions the witness read a portion of the sixth paragraph and then skipped to the ninth paragraph and read a portion of that. What the hammer adjustment does is to determine how close the male die shall come to the bed of the female die. The clutch as shipped was properly adjusted and if it were left in that adjustment on a 2¼-inch die for ⅜-inch soft steel it would have been all right.

"X Q. 54. I am talking about the Smith machine. You never tested a single piece of stock on a 2¼-inch die?

A. We tested the die, but never put any ⅜ stock on those dies. We put the dies in the machine to see if they had alignment."

This witness further testified that Defendant's Exhibit P was a blueprint showing a female member, No. 150-A, and a male member, No. 151-A, of a 2¼-inch die.

"X Q. 55. Now, you show on that blueprint your 2¼-inch die?

A. Yes, sir.

X Q. 56. That is, No. 150-A is the female member, and No. 151-A is the male member?

A. Yes, sir.

X Q. 57. And it says: '⅜ inch soft steel on 90,000 pounds press.'

A. It doesn't say anything about 103,000, 12 feet long.

X Q. 58. No. That is, a 90,000 pound press would be ⅜ths inch steel on that die, but a more powerful press would not?

A. I did not say that.

X Q. 59. Do you mean that?

A. No, sir, I don't. I mean that blueprint—the question you asked me——

X Q. 60. As you read that blueprint, would you understand from it that you could bend ⅜-inch soft steel on that die on a 103,000 press?

A. It does not say so there, does it?

Mr. King: Or lower.

The Witness: I know what I did. I did bend ⅜ on 2 inches, not 2¼.

[fol. 160] X Q. 61. Now, Mr. Ohl, as you read that blueprint, with all your skill and experience, I want you to tell us fairly, doesn't that imply to you that you could bend ⅜-inch steel on a 103,000 pound press?

A. It does not. Our specifications do.

X Q. 62. I was coming to that in a minute. But you say the blueprint does not?

A. It does not.

X Q. 63. By the way, you shipped the 2¼-inch die to the Smith people?

A. Yes.

X Q. 64. And you never shipped a 3-inch die?

A. They never ordered one.

X Q. 65. You never shipped it?

A. If they never ordered one, we never shipped one.

X Q. 66. You knew they wanted this machine to bend ⅜ inch material, didn't you?

A. I did not. He told me or wrote me a letter saying that he never used anything more than a quarter inch.

X Q. 67. Let us have that letter. While that is being searched for, you understood then that the Smith people would never use this machine for any heavier metal than ¼ inch.

A. Only what he told me.

X Q. 68. No.

A. He could use ½-inch on it.

The Court: Answer the question. You are perfectly capable of answering the questions. He said that you

understood that Mr. Smith never intended to use that machine for more than quarter inch metal, in bending?

The Witness: Yes, sir.

The Court: Now, say yes or no.

The Witness: Yes.

The Court: The answer is yes."

With respect to blueprint 490 the witness testified that that related to a 90,000 press 10 feet long, and if the press were made longer it would have to be built a little stronger because the longer the material in the press the more spring in bending, and hence the press should be made a little stronger. Length makes a difference.

"X Q. 69. And you would not expect to get the load that [fol. 161] is imposed on a 12-foot press by a test of material one inch, would you?

A. No, sir. Wait a minute. Not too quick. The test of material is an entirely different thing than the stress on the machine."

Exhibit P 4-A is imprint of the dies shipped to the Smith Company by the Ohl Company on March 2, 1926, for use on the very press involved in the litigation.

Mr. Gallagher (reading): "With reference to the 90 degree die that we ordered in our letter yesterday, we failed to mention that we would like to have it made as narrow as possible, as it will be only expected to bend ¼-inch thick material."

"X Q. 70. That is the letter that you said that led you to believe that they only wanted to bend that thickness?

A. That is one of a lot of information that they gave me about quarter inch.

X Q. 71. You referred to a letter?

A. Yes, sir; that is the letter.

X Q. 72. It was two months practically, all but eleven days, after you got Exhibit 18, that you shipped the 2½-inch die for ⅜ material?

A. No; I didn't say ⅜ material. I haven't said it anywhere that I can see.

X Q. 73. You said ⅜, 90,000 press.

A. Yes, but he didn't have that press.

X Q. 74. You knew he didn't have it?

A. That is why I didn't say it.

X Q. 75. You knew he didn't have it,—a 90,000 pound press?

A. Yes.

X Q. 76. And then you shipped a die to him for use on a 90,000 press?

A. No, sir.

X Q. 77. Pardon me until I complete my question. Knowing that he had no such press?

A. No, sir.

X Q. 78. How long did you make this 2¼-inch die?

A. Twelve foot 2 inches.

X Q. 79. You did not make it for use on a 10-foot 6 press?

A. It was not ordered for that.

X Q. 80. I did not ask you that?

A. No, sir.

[fol. 162] X Q. 81. You made it for use on a 12-foot press, didn't you?

A. Yes, sir.

X Q. 82. And for this very press?

A. Yes, sir.

X Q. 83. I show you Exhibit 17, which is referred to as the order: 'One set machinery steel standard heavy square die, 150-A, 151-A, with tool steel inserts 12 feet 2 inches long, Ohl & Company blueprints'; and then in writing, '2¼ inches across the corners of the female die.'

A. Yes, sir.

X Q. 84. Whose writing is that?

A. It looks like the order clerk's.

X Q. 85. Your order clerk?

A. Yes, sir.

X Q. 86. And that was sent for use on the Ohl press, wasn't it?

A. Yes, sir.

X Q. 87. And that order was January 18, 1926, two days after you received this letter referring to quarter-inch materials?

A. *A.* Yes sir. It speaks for itself.

X Q. 88. Now, don't you think it funny that Smith and Hovasse wanted to see you bend ⅜ material down there when they did not want to bend any at their plant?

A. Why, no, I don't think it was funny.

X Q. 89. Now, let's see; here is a man that never intended to bend anything heavier than quarter-inch material, as you understood it?

A. That is what he told me personally and wrote in the letter.

X Q. 90. And he came down to your plant and had his chief mechanic hang around for a couple days and asked you to bend 3/8 material, didn't he?

A. Yes, sir.

X Q. 91. Didn't you think it was funny?

A. I should say not.

X Q. 92. Not at all? Well, by the way, you did not bend 3/8-inch soft solid material, did you?

A. We did much more than that.

X Q. 93. Here is Exhibit P 2-B?

A. Yes, sir.

X Q. 94. That has got a little copper plate on there, hasn't it?

A. A sixteenth of an inch, which makes the hard copper —makes the steel 5/16, making the two together 3/8 thick.

X Q. 95. You have got it now hard copper?

[fol. 163] A. That is what we might use on embossing members, and we have got to have it hard copper.

X Q. 96. Is it harder to bend this piece of 3/8 P 2-B than if the entire thickness was steel?

A. It is on the dies that I use only 2 inches across the corners, when I do, and I don't have 3-inch dies, and there is a little difference between the 16th lining of copper in there than if it was all the way through 3/8, but that little difference in the force it would take to bend that is made up by 30-odd percent more than——

X Q. 97. We will come to that difference in a moment. You saw this test?

A. I was there.

X Q. 98. Did you say anything to Hovasse about that copper plate?

A. No; he saw it.

X Q. 99. Do you think he saw it?

A. I think he did.

X Q. 100. Well, do you know that he did?

A. He did, because he had to wait until I cut that out of the strip, to get three strips to make 12 feet; he had to wait there.

X Q. 101. You saw it, didn't you?

A. I surely did.

X Q. 102. So that at the time of this so-called test down in your factory you did not use any 3-inch dies; that is true?

A. Yes, sir.

X Q. 103. And you did not use any 3/8 soft steel material?

A. No, sir.

X Q. 104. Twelve foot long?

A. No, excepting the two-piece material combined to make the 3/8.

X Q. 105. Which was not of the soft steel 3/8 because it had this copper strip?

A. Yes, copper lining.

X Q. 106. And in spite of that you dictated a letter of acceptance for Hovasse to sign, didn't you?

A. Yes.

X Q. 107. And you did not subject that press to the test mentioned in Exhibit A at all, did you?

A. Thirty percent more.

X Q. 108. A greater test?

A. A greater test.

X Q. 109. But not the same test?

A. Greater; a stronger machine than we intended to give him. Furthermore, the machine weighed 108,000 pounds, 5,000 more than 103,000.

X Q. 110. Did you explain to Hovasse the difference in [fol. 164] the load imposed upon the machine by reason of using narrower dies?

A. Why, blueprint 490 shows that.

X Q. 111. No. Did you explain it to him?

A. Yes.

X Q. 112. You did?

A. Certainly.

X Q. 113. So that you showed Hovasse where you were only using a 2-inch die, but that threw a greater load on the machine?

A. I told him that was a better test.

X Q. 114. And he took your word for that?

A. I imagine he did. I had more experience than he did."

The witness then testified again in reference to the clutch adjustment and said that any mechanic or sheet metal worker could adjust it; it was a very simple adjustment to make and its adjustment had been thoroughly explained to Hovasse by Alling.

"X Q. 115. Now, if the clutch were properly adjusted and an overload were applied in bending a piece of metal, then the clutch would disengage?

A. It would slip; it would not disengage. It would slip.

X Q. 116. It would slip, and there would be no harm done?

A. No, sir.

X Q. 117. Now, if you come down a second time on that same piece of metal—of course, the metal had not grown any thicker, had it, between strokes?

A. No, sir.

X Q. 118. So that the clutch adjustment is all right, isn't it? That is true?

A. You mean properly adjusted now, or improperly?

X Q. 119. Yes; if you had not touched it.

A. Yes, sir.

X Q. 120. If it came down the second time, the clutch adjustment would be all right?

A. Yes, sir.

X Q. 121. Because if the clutch adjustment had been wrong, you would have had the clutch slip on the first stroke?

A. Yes, wherever the most power was applied.

X Q. 122. So that if the machine broke on its second comedown, that breaking would not be due to any lack of clutch adjustment, would it?

A. No, sir.

X Q. 123. And that means that it would not be due to overloading the machine?

A. It does not mean that.

[fol. 165] X Q. 124. I am talking now about a case—

A. No, it does not mean that. That is your answer.

X Q. 125. I want to be sure you understand it. I am talking about a case where the clutch is properly adjusted. Is that clear to you?

A. Yes, sir.

X Q. 126. If you had the clutch properly adjusted, and it came down once on a piece of metal——

A. And made the bend?

X Q. 127. Left the metal right there; and brought it down again——

A. Yes.

X Q. 128. —and then the machine broke——

A. Yes.

V Q. 129. —that would not be due to overloading it, would it?

A. That would be due to the fact that you broke the machine the first stroke.

X Q. 130. I see.

A. No other way. On the second you did not break it. There is no such strain after it is formed.

X Q. 131. If it broke at the second stroke it certainly would not be due to overloading?

A. No; it had already been broken.

X Q. 132. You stated that to be your opinion.

A. My opinion. It cannot be any other way.

X Q. 133. It could not break on the second stroke?

A. Positively not, with the same adjustment of the hammer.

X Q. 134. I am saying that the hammer is left alone.

A. Have not changed the distance between the dies.

X Q. 135. Now, you have heard the professors describe the noise and the extensive crack across both these supports?

A. Yes; just like a shot.

X Q. 136. Like a shot?

A. Yes, sir.

X Q. 137. And you heard him testify how that occurred at the second stroke of the hammer?

A. I heard him say that.

X Q. 138. You don't think they could have missed that noise the first time, do you?

A. No, they could not.

X Q. 139. Then do you think they may have been mistaken about it?

A. Positively; the first time—the fracture was the first time; never the second.

X Q. 140. But it never made any noise the first time, did it?

A. Yes; that is the time it made the noise.

[fol. 166] X Q. 141. Let us see; how much time would elapse between the two intervals? Will you show with your hand how fast your hammer comes down?

A. Nineteen strokes a minute.

X Q. 142. Will you just indicate to the jury how that is?

A. [The witness indicates.] I will take my watch out if you want it accurate.

X Q. 143. No. There is a measurable period of time between the two strokes?

A. They stopped the machine when they made the second bend.

Mr. Gallagher: May that go out, your Honor?

The Court: Yes.

X Q. 144. Those two strokes were not so near together that they could have confused that report?

A. I don't think so.

X Q. 145. I do not ask you to accept this as a fact, but assuming that that machine came down the first time and there was no noise of a break, and went up and came down the second time, and then you heard the break,—assuming that is true, the break was not caused by overloading, was it?

A. It surely was, the first time.

X Q. 146. All right.

A. It was not broken the second time; I know it.

X Q. 147. You were not there?

A. I was not there. I will demonstrate it; take a new machine and break it for you.

X Q. 148. Well, assume that the break did not occur at the first time—I do not ask you to accept that as a fact—but assume that it did not break the first time, then the break came on the second down stroke?

Mr. Friedman: Hasn't he got to assume also that the adjustment remained the same?

Mr. Gallagher: Yes, I want to make all assumptions.

X Q. 149. Let me start fresh. Now, assume that the press was properly adjusted, and assume that it was not touched between the first and the second operation, and assume that the machine was properly run,—the application of motor and foot treadle, and it came down the first time

and went up without a break, and came down the second time and broke; you understand that assumption?

A. And I will assume that if they did not get a piece of [fol. 167] metal between the dies other than the piece of metal they are bending.

X Q. 150. Yes.

A. I will say that if they did not try to put in any layer under the dies, and I will assume that they did not take that babbitt metal under that and push it up, that it might have broken the second time; the strain being due to the layer of babbitt metal, requiring an extra power more than the first.

The Court: I think you should answer the question. You never answer the questions.

The Witness: Your Honor——

The Court: It will help us a great deal if you just answer the questions.

The Witness: I am trying to.

The Court: But you are not at all succeeding. I would like to hear you answer a question yes or no or you don't know.

X Q. 151. Now, assuming that the clutch was properly adjusted, and assuming that the power was properly applied, and assuming the same piece of metal between the dies at both operations in the same position, that the machine comes down once and goes up and nothing happens, comes down the second time and then breaks, that break was not due to overloading the machine, was it?

A. No.

X Q. 152. That break was due to the fact, however, that some stress was put upon the machine that it could not stand, wasn't it?

A. Yes, sir.

X Q. 153. Now, that stress or load is put upon the machine between the male die and the female die, isn't it?

A. Yes, sir.

X Q. 154. And it is put upon the machine by reason of the fact that the dies come too close together,—the metal is too thick?

A. Yes, sir; not clearance enough in the dies.

X Q. 155. And you can break that machine by cutting down the clearance the thickness of a piece of paper, can't you?

A. Without any paper even.

X Q. 156. Well, let us say tissue paper. We will split the difference.

A. I say with no paper; nothing between the dies at all even."

[fol. 168] The witness testified that having a piece of metal the thickness of tissue paper to bend, the ideal setting of the dies was to provide for the male die coming as close to the female die as the thickness of the material to be bent.

"X Q. 157. Now, if you set it about a sheet of paper nearer you would throw a load on the press that the press would not bear?

A. That would be overcome easily by a 16th of an inch in the bed. If the machine was set that way it would break. If you had no more than that paper thickness interfering with the opening——

X Q. 158. Let us take two.

A. Three, would go to 1/16.

X Q. 159. One-sixteenth?

A. Yes.

X Q. 160. So that you could have a maladjustment of the male and female dies to the extent of 3/16?

A. No, sir; 1/16.

X Q. 161. And the spring in the bed would take care of it?

A. The spring in the bed would take care of it, and the mechanism in here would break that little extra strain on the press.

X Q. 162. So that at the time that this machine broke, if you assume what I have asked you to assume, namely, that it broke the second time and not the first, at the time it broke, I say, it did not break because of any overload on the dies, did it?

A. Not at that time.

X Q. 163. Now, how would you break the machine with a piece of paper?

A. By bringing the adjustment of the hammer down so low that even with a piece of paper between the dies the

eccentrics were nowhere near the bottom of the stroke, only ¼ of the way around the revolution of this shaft; in other words, one-quarter of the adjustment would strike and start to hit the die with a piece of paper in it; you still have got to come down the 3/8 before this hammer is at the bottom of the stroke; then a piece of paper between the dies, if the proper adjustment of the clutch was not there, would break the machine in other words. You will have a quarter of an inch between the dies——

X Q. 164. You were present——

A. If you put a piece of paper in there and you tighten up that clutch so that it won't slip, you have got enough power in the gearing,—you will break the bed or you will [fol. 169] break the hammer, or you will break the housing with a piece of paper.

X Q. 165. And that is because the hammer—I mean by the hammer the upper member that forces the male die down——

A. The hammer.

X Q. 166. —is so adjusted with reference to the female die on the bed that it comes down the thickness of a piece of paper lower than the space——

A. No, sir. The thickness of a piece of paper and probably a quarter of an inch more before the revolution of the eccentric stroke gets around to put the pressure on the die; the paper thickness could not break the machine, or up to a 16th; I think there is enough give in the machine to overcome that—factor of safety.

X Q. 167. A 16th?

A. Yes, sir.

X Q. 168. Now, let's see; you were present when Mr. Alling gave his deposition, weren't you?

A. Yes, sir.

X Q. 169. And what position did he hold with you?

A. He was the foreman and superintendent of the machine shop.

X Q. 170. For some years, wasn't he?

A. Yes; I think three or four.

X Q. 171. Very familiar with your presses?

A. Yes, sir. He built probably 125 of them, or 100.

X Q. 172. Do you remember my asking him this question and his making this answer:

'Q. Well, if you adjusted the hammer for 5/16 thickness of metal and worked on a ⅜ thickness, that is, 1/16 more of metal, you would probably have trouble with the machine, wouldn't you?

A. Yes, sir; the clutch would slip; if it was adjusted improperly the clutch would slip.'

Do you remember that?

A. I don't remember that.

X Q. 173. Is that your opinion?

A. No. If the clutch was adjusted properly and you put ⅜ through where there was room for 5/16, that is improperly adjusted, and wouldn't slip, and he didn't mean it in any other way, with the years of experience he has had.

X Q. 174. I see. Very fortunately I put another question.

[fol. 170] 'Q. You might also have trouble because of the unusual stresses set up by lack of alignment in the hammer and the bar pushed——'

I will pause there a moment. That means if you had not got quite down to a full stroke, but had the power, the load imposed upon your hammer, and the bar pushed, in that relation you would have trouble?

A. No, that doesn't mean alignment.

X Q. 175. Doesn't it?

A. No, sir.

X Q. 176. Let us see what he answered to it. He said: 'Yes, that would throw on the machine unusual stresses that were not contemplated in the building of it.'

A. Yes, sir.

X Q. 177. Is that true?

A. Yes, sir; that is the alignment of the board in relation to the hammer, one end being, say, a half inch opening, and the other end ⅜, if you adjust it where the alignment is.

X Q. 178.—

'Q. If the machine could not accommodate itself to the variance which you described before the thickness of metal—is that clear to you, what I refer to?'

And he said: 'Yes.'

'Q. The variances which I refer to are the differences found in the commercial gauges of metal.'

Is that clear?

A. Every sheet is different.

X Q. 179.—

'Q. And by that you understand I mean these variances that come in metal that are used day in and day out.

A. Yes.'

Now, is that clear to you so far?

A. Yes, sir.

X Q. 180. I will repeat it then:

'Q. Now, I repeat, if the machine could not in ordinary operation be readily adjusted to these variances you might have some degree of unusual stress, might you not?

A. Yes.'

A. That is proper.

X Q. 181. That is so?

A. That is positively so.

[fol. 171] X Q. 182. So that if your machine was built so that it could accommodate itself to these variances in the thickness of metal that commercially come in metal plate, then you would have some unusual stress thrown upon it, which the machine is not able to stand, wouldn't you?

A. No, sir. The machine is built to withstand some unusual stresses.

X Q. 183. I see.

A. But there is a limit.

X Q. 184. But there is a limit?

A. Yes, sir.

X Q. 185. Now, Mr. Kolarsey at your direction inspected this machine about September 1st, did he not?

A. I believe he did.

X Q. 186. And you heard his testimony, that it was set up O. K.?

A. No. I heard that it was level only.

X Q. 187. Weren't you here during his testimony?

A. Yes, sir.

X Q. 188. Did you hear him testify in answer to this question:

'Q. And the real and only important thing that you had in mind was to see that it was level, and to see that it was all set up right?

A. Yes.
Q. And that it was O. K.?
A. Yes, sir.
Q. The entire set-up of the machine?
A. Yes, sir.'

Did you hear his testimony?
A. Yes, sir."

The witness further testified that he had furnished his counsel with notes in the cross-examination of Hovasse with respect to the foundation which Hovasse constructed for the Smith machine; that there was no claim now that the foundation constructed by Hovasse for the machine in question was improper.

"X Q. 189. Now, so far as type of foundation was described by Mr. Hovasse, namely, that he went lower down than was anticipated to get bed rock, that is good practice, isn't it?
A. That makes a better foundation.
X Q. 190. There is no complaint with respect to that?
A. No, sir; not a bit.
X Q. 191. Now, what is the complaint with respect to foundation?
A. None that I know of.
X Q. 192. That is what I say.
A. But there is a complaint, as I understand, between the centers of the holes for the bolts.
[fol. 172] X Q. 193. What is that complaint?
A. The one that you made just now, about the distance of an inch.
X Q. 194. We agreed that that didn't make any difference.

Mr. Friedman: We haven't made any complaint about it.
Mr. Gallagher: I thought you did earlier.
Mr. Friedman: I did it simply to see how accurate Mr. Hovasse was.

X Q. 195. Now, with reference to the bed of the machine, you testified that it did not make much difference whether the bed was sunk in solid or not, although you did say something to Smith about a 16th of an inch clearance.
A. Yes, sir.

X Q. 196. And, as a matter of fact, in Exhibit 14, some of the blueprints show the bed of the machine unsupported, and others show it down, don't they?

A. Yes, sir.

X Q. 197. There is no complaint on that score, is there?

A. No, sir.

X Q. 198. Now, with respect to dies, I think we have said all that we can say with respect to that. Your stand on that is that you did not anticipate that Smith would try to bend ⅜-inch stock on this 2¼-inch die?

A. I did anticipate he would. I thought he would some day get into heavier stuff.

X Q. 199. And you shipped this machine to him to use for that purpose?

A. Yes, sir; sold it to him for that purpose, to bend ⅜-inch soft steel.

X Q. 200. Then that is out of the case?

A. Yes, sir.

X Q. 201. By the way, what you meant by bend ⅜-inch soft steel, was that he could bend it and sell it commercially?

A. I mean to bend it, like two or three thousand other people.

X Q. 202. In the trade?

A. On 3-inch dies.

X Q. 203. Or 2¼-inch dies?

A. No, sir.

X Q. 204. Then you do make a point that your press was not fairly tested by trying to bend ⅜-inch material on a 2¼-inch dies?

A. I don't make that a point.

X Q. 205. Do you claim that it was not a proper operation to put your machine to, to try to bend the 3/16 material on 2¼-inch dies?

A. I claim that was proper, to bend 3/16 on 2¼-inch dies.

[fol. 173] X Q. 206. So that at the time the machine broke they were not engaged in any improper operation?

A. They surely were.

X Q. 207. So far as the material, 3/16-inch, and so far as the type of die being used were concerned?

A. And the adjustment of the hammer.

X Q. 208. I have eliminated that now.

A. All right.

X Q. 209. Now, there has been a lot of talk in here about grease. There wasn't any grease cup on the machine, was there?

A. No, sir. Yes, there was our form of grease cup.

X Q. 210. Where is the grease cup?

A. A long pipe in the flywheel that holds, with the roller bearings, two teacups of oil.

X Q. 211. Grease, I am talking about now.

A. We don't use grease, except in the roller bearing.

X Q. 212. Well, was there a grease cup on the machine?

A. Yes, sir.

X Q. 213. Where was it?

A. Running away out here, right along down in here; amongst these rollers, in the roller bearing and the rollers——

X Q. 214. You have answered the question.

A. I have not. The grease cup you asked me.

X Q. 215. I asked you where it was, and you pointed it out to me.

A. I am not sure. There is a bunch of rollers—roller bearings, and the grease runs in between here; that is what we call grease cups; different shapes of——

The Court: You say there were grease cups.

The Witness: That is what we call them in our factory. Grease cups are called oil cups, the same thing.

X Q. 216. Oh, the same thing?

A. They look like an oil cup and a grease cup.

X Q. 217. Don't you have to force grease into a machine?

A. No, sir. Some grease——"

The witness then testified, with respect to his claim made in a letter of September 14, 1926, that the trouble being experienced at that time with this machine was due to failure to oil it properly. The inside of the bearing with respect to which this complaint related had been supplied [fol. 174] with an oil groove, and provision for admitting oil to the bearing surface had been made by a boring shown in the blueprints, exhibits in the case. It did not appear, however, that the grooving in the bearing intersected the lumen of the oil tube. This the witness said was not required. The witness testified with respect to this.

"X Q. 218. Now, you see I am asking you now only a very simple question, and that is this: That if below that oil hole inside there was no groove that happened to intersect at the point of that hole there the oil would then go directly against the shaft, wouldn't it?

A. Assuming that there was no room between the inside of the bushing and the outside diameter of the shaft, then it would go directly to the shaft.

X Q. 219. Now, there was a hole a 6/1000 of an inch?

A. Yes, sir.

X Q. 220. And in order to get into these little holes that oil had to thin out so that it could pass through 6/1000 of an inch?

A. Room enough, I said, for a running fit.

X Q. 221. That is what you said. Now, how thick is that paper, should you say?

A. I don't know.

X Q. 222. And that paper is Exhibit OO. Well, tell the jury, because if you know whether oil will go through 6/1000 of an inch, you must know what that represents.

A. Yes.

X Q. 223. Tell us what that represents.

A. I don't know the thickness of that paper.

X Q. 224. About what?

A. I don't know.

X Q. 225. What is your best judgment?

A. I don't know about that. If I had a micrometer I might measure it.

X Q. 226. I am asking you now about your judgment.

A. I don't want to guess.

X Q. 227. Could you guess 6/1000 of an inch?

A. There is room enough for a running fit with a film of oil.

X Q. 228. I know that is what you said.

A. That is the best I can say. We run it six days, tested the machine, and then they run it six months before the bearing got hot.

X Q. 229. But you set the shaft in there and before you [fol. 175] set it in you greased it, didn't you?

A. No, sir. We put it in and then put the oil in the pipe.

X Q. 230. Didn't you put oil on that shaft before you put it in?

A. Just a little covering of oil."

The witness testified that what Hovasse did in connection with the oiling facilities tended to ruin the bushing and did not tend to make the oil run more freely around the shaft. It permitted the oil to pass into the side of the bushing but did not tend to lubricate the shaft as good as before; that the oil hole diameter is ½-inch with a ½-inch pipe 8 inches long which the witness calls a grease cup. Of this pipe 2 inches is in the housing and ½ inch in the bushing and with the space between the shaft and the bushing 6/1000ths of an inch and the figure 8 oil grooves in the bushing would take about a tea cup full of oil; that the bushing shows signs of having been hammered; that it positively was not hammered by the Ohl Company; that it shows lines where it was driven in; that it also shows a burning mark "when it gets hot it gets black".

The witness testified that he thought his machine had a proper safety factor in the end stanchions, that his figures agreed substantially with Professor Norton's in his report, but that when it came down to tensile strength he, the witness, didn't know anything about that.

"X Q. 231. Now, your estimate of load—and by that I mean the amount of pressure occasioned by bending—results from taking the test on a one-inch piece of metal and multiplying it by 144, the length of a 12-foot press?

A. Not mine.

X Q. 232. Do you regard that as a proper way?

A. I am not expert enough to talk about the same situation that Mr. Perkins did and these experts—these professors. I have four or five different tests—testing machines—and practical tests that I can give you information on, if you want to know about what I think and what I know.

X Q. 233. So far as I inquire about it, I do want to know, and only to that extent.

A. But what Mr. Kingsland did, that is a question.

[fol. 176] X Q. 234. You were here when he testified, weren't you?

A. Yes, sir.

X Q. 235. Let us see; we had that written out, because I thought your memory would be a little uncertain about these.

A. I have a good memory, Mr. Gallagher.

X Q. 236. About some things, but you don't seem to remember——

Mr. Friedman: Now, I object to comments of that kind.

X Q. 237. Here is what he said:

'How much does it take to bend a foot, on your figures, based on your 4,766? A. Twelve times that.'

Do you remember that testimony?

A. Yes, sir. That is, an inch, or did you say a foot?

X Q. 238. A foot. So that what he did was to bend an inch of steel and got a figure of 4,766 pounds, and then multiplied that to find any given length?

A. Yes, sir.

X Q. 239. Now, let me show you Exhibits MM here. Do you notice in the bend a certain spread sideways?

A. Yes, sir.

X Q. 240. There is a little outlet of pressure each side on that narrow piece, isn't there?

A. Yes, sir.

X Q. 241. Now, that is called lateral expansion, is it?

A. That is from the soft material that squeezes out on the narrow piece.

X Q. 242. Well, that is the name that you give to it, isn't it—lateral expansion?

A. I don't know what the professors call this stuff.

X Q. 243. You don't?

A. I don't want to.

X Q. 244. You want to know what the fact is if it affects the safety of your machine, don't you?

A. I certainly do, but not through their figures.

X Q. 245. I am trying to help you. See if we can't. When you squeeze a narrow piece of paper, like that shown on MMM, you also said that you got a little spread out to the side; is that right?

A. With that heavy pressure.

X Q. 246. Yes, with the heavy pressure. Now, of course, the longer the metal is the less spread you get; that is true, isn't it?

A. You are forgetting that that is a cross grain, and when you spread these sheets it is with the grain.

[fol. 177] X Q. 247. I am going to come to that in a moment. Let us take this for a moment now. As I present it to you, you see the little spread there, don't you? Pardon me. I thought you had seen it.

A. I see a buckle there caused by pressure.

X Q. 248. Now, that is called lateral expansion, isn't it?

A. I don't know what you call it.

X Q. 249. Now, in all your sixty years of making all these presses, aren't you familiar with the fact that a narrow piece of metal when bent has a certain give at the ends?

A. We don't make any bend like that.

X Q. 250. Aren't you experienced with that?

A. No, I won't say I am,—what you call lateral expansion.

X Q. 251. Let us get out of this field of territory now and get down to cold turkey. If you take a length of metal 12 feet long you would not get the same relief that you get in a narrow piece, like that?

A. What do you mean by the relief?

X Q. 252. This side expansion.

A. It don't show on the pieces.

X Q. 253. Therefore, it is not a fair test, is it, of what will bend a piece of metal 12 feet long, to perform a laboratory bending experiment on some machine on an inch wide material?

A. Personally, I don't know except——"

[Examined with reference to Exhibit WW.]

"X Q. 254. I think you said that that blow hole did not make any difference in the casting?

A. I did.

X Q. 255. You had another name for it. What did you call it? What was that name, do you remember?

A. Wait a minute.

Mr. King: Shrinkage strain.

The Witness: Shrinkage strain—shrinkage hole.

X Q. 256. Is that another name for blow hole?

A. That is another name; where the casting is heavy, the outside cools off first and the inside later, and the metal pulls away and it leaves a shrinkage hole.

X Q. 257. And those shrinkage holes or blow holes—let me call them blow holes.

Mr. Friedman: No, they are not.

X Q. 258. Is there a difference?

A. Yes, sir.

[fol. 178] X Q. 259. What is the difference?

A. A blow hole comes from air that will bubble through from sand and dirt sometimes will float on top, and if they don't have the gate open where they pour the molten in to let the dirt rise up, they will make another kind of a hole; and then again there is a little sand hole, and then again there is what you call a shrinkage hole.

X Q. 260. Now, those holes are voids, aren't they? They are empty spaces; nothing but air in them?

A. Yes, sir.

X Q. 261. And great caution is taken in castings to prevent those holes—those voids?

A. We expect them.

X Q. 262. You expect them?

A. Yes, sir.

X Q. 263. You don't think they do a bit of harm?

A. Not a bit. I could drill two more holes in there and it would not weaken the machine, the same as these holes here.

X Q. 264. Did you hear Mr. Alling testify about the inspection he made at your plant?

A. Yes, sir, I think he did.

X Q. 265. To find out, before he used these castings, whether there were any blow holes or not?

A. Yes, sir. They do it every day.

X Q. 266. And I said: 'The tapping was done for what purpose? A. To see if there were any blow holes under the surface.'

A. Yes, sir.

X Q. 267. I said: 'If you had such blow holes you might have a cracking when the machine was subjected to stress in operation?' He said: 'Yes, if the blow holes were big enough, and enough of them.'

A. I agree with him.

X Q. 268. 'Q. That is, a cracking would indicate to you, and big enough blow holes, there is some imperfection in the metal?' Do you agree to that?

A. Yes, I agree with him, if he means that spot where that blow hole is.

X Q. 269. The blow holes do indicate an imperfection in the metal?

A. Yes, sir.

X Q. 270. And by imperfection in the metal you mean something that affects its utility?

A. If it is big enough.

X Q. 271. We will come to the size of it later. If it is big [fol. 179] enough it is an imperfection?

A. Yes; then it will affect the utility and the strength of the casting.

X Q. 272. Would you call that a blow hole?

A. I call that 'nothing'. I passed it.

X Q. 273. And you knew it?

A. I knew it."

The witness then testified with respect to Exhibit P-2, which was a piece of metal bent at the Ohl factory on the machine in question at the time of the so-called test. Ohl testified it had not been brought to a 90-degree bend although it was bent on a 90-degree die.

"X Q. 274. What is the explanation of that?

A. No attempt was made to bring it up to 90 degrees. The attempt, the only one I made, was to see if we could bend three-eighths soft steel to a two-inch die. And after, if I am allowed, your Honor, after deflection of three-eighths to an inch, a pressure of certain tons per pound, and from three-quarters to an inch, is no different.

X Q. 275. That wouldn't be called a commercial job, would it?

A. No; we didn't attempt to put it at right angles. It would be a commercial job if we didn't want a 90-degree angle.

X Q. 276. Now, I mean for a 90-degree angle job that wouldn't be a commercial job, would it?

A. No; that is an obtuse angle.

X Q. 277. Now, when you bend metal to a 90-degree angle, the result of that operation is to take some of the spring of the metal out of it, isn't it?

A. No. Simply bending.

X Q. 278. Now, if that isn't clear, I will make it clear. There is a certain tendency of the metal to spring back into shape, isn't there?

A. Sometimes.

X Q. 279. That is true, isn't it——

The Court: You have so many kinds of metal. There are so many kinds of steel, cast iron, light gray iron, and other colors here—I don't know much about it.

X Q. 280. Well, I will define it. Soft steel, 15 to 20 points, Bernille, is that the final measurement?

A. No, sir. This is 10 to 15 commercial, called soft steel.

X Q. 281. And is that Exhibit P-2,—is that only 10 to 15 points carbon?

A. I don't know. That may be harder.

[fol. 180] X Q. 282. What is referred to as 10 to 15?

A. Commercial steel is bought and purchased in construction work and bridge work, just rough material. From 15 points to 25 points it is called machinery steel; from 25 to 35 it is called higher carbon. From 35 to 45 still higher carbon, and when you get to 90 degrees carbon it is tool steel.

X Q. 283. You noticed Professor Norton's report—'Metal, open hearth steel from 15 to 20 point carbon.' Do you note that?

A. I agree with that.

X Q. 284. And then, your expert on the stand the other day, Mr. Kingsland, he said that was a very fair carbon content for that kind of steel?

A. Yes, sir.

X Q. 285. Now, do you agree with that?

A. I agree with that.

The Court: And that was 15 to 20.

Mr. Gallagher: Fifteen to 20 point carbon; yes, your Honor.

The Court: All right.

X Q. 286. This also goes on: 'Our test showed it to have Bernille hardness, No. 137.' Do you know about that Bernille hardness?

A. No, sir; never heard the word 'Bernille' in testing, and I don't know anything about it.

X Q. 287. Now, assuming you have soft steel of 15 to 20 point carbon and you have a plate of it and, say, a four-inch wide plate of the length of Exhibit P-2—is that clear to you?

A. Yes, sir.

X Q. 288. Now when you bend it there is a tendency of the metal to resist that bending, isn't there?

A. Every bend; yes, sir.

X Q. 289. And there is a little tendency of the metal to spring back?

A. Sometimes it springs in.

X Q. 289*a*. Well, spring one way or the other?

A. Yes, sir.

X Q. 290. Now, when you make the bend finally, don't you take that springiness out of the metal at the point of the bend?

A. No, sir; the hard spot in there, it is impossible to take it out.

X Q. 291. I don't mean where you have a hard spot. I mean ordinary commercial metal.

A. There are hard spots all over those sheets. The metal might be of a certain hardness where the outside end would break the same as the sample on the table. If the metal [fol. 181] didn't break naturally there is a stress against the fibre.

X Q. 292. Now, if you took Exhibit P-3 and performed the operation you performed there, making that obtuse angle, wouldn't it require as much, if not more, power to take and bend it to a 90-degree angle on that die and set it there?

A. To set it is different. We don't set this material. We bend it only.

X Q. 293. To set it would take more?

A. Oh, yes.

X Q. 294. How much more?

A. Well, the Bliss process requires 200,000 pounds to set certain dies together and form certain products.

X Q. 295. Your machine couldn't stand the stress of the loads thrown upon it in setting?

A. Not beyond its capacity; no, sir.

X Q. 296. Well, in setting this type of material, 3-inch soft steel——

A. There would be some factor of safety beyond the 3/8 material before the machine would break.

X Q. 297. But the machine isn't able to perform that operation?

A. Yes. That is what it is built for, to perform such work.

X Q. 298. And setting?

A. Not setting.

X Q. 299. I am talking about setting. It isn't built strong enough to set 3/8-inch material, is it?

A. No, sir."

The witness further testified that Exhibit 23, which was the material bent at the request of Mr. Dailey by the Smith Company, showed that it had been peened. (Peening is hand-hammering the material.) This work was done on the exhibit in question on both ends. There was bowing in the work and peening on the middle of it.

X Q. 300. Now, you told the jury about bowing, and you told these gentlemen that every machine bows, every piece of metal bows when it is bent in any machine.

A. No; every piece of metal, metal of this character, from 3/16ths up to galvanized iron, if I am allowed to explain, your Honor—26-gauge, 22-gauge, 30-gauge, for making skylights and metal windows, I don't say they bow like this heavy material, this rough material.

The Court: Never mind the galvanized iron. We have enough iron. There are as many irons in the fire now as necessary.

[fol. 182] The Witness: Well, galvanized iron is soft steel just the same.

X Q. 301. Let's stick to this material we have described as 15 to 20 point carbon soft steel.

A. Yes, sir.

[Mr. Gallagher shows Exhibit UU to the jury.]

X Q. 302. Now, you have told the jury that when this soft steel we are dealing with here is bent in a machine there is always some bowing of the material in the middle?

A. Yes, sir.

X Q. 303. Did you notice on Exhibit 23 that the peening is on the ends?

A. Yes, sir.

X Q. 304. As well as the middle. What did that indicate to you?

A. There wasn't clearance enough in the die.

X Q. 305. There was not clearance enough in the dies?

A. To take properly an extra strain, or it might have been too much clearance in the die and left room for the variations in the material, to bow.

X Q. 306. So, if you get too much clearance you get that result and if you don't get enough you get it?

A. Yes, sir. If you have too much clearance in the dies you have allowed room enough for the hard and soft spots to begin their action and get in or get out. If you don't have enough clearance in the dies you will set the metal at the point where you didn't have the clearance so the chances are that would throw from an eighth of an inch out and bow by stretching the metal at the corner."

The witness then testified that if the dies were set closer together than the thickness of the piece of steel to be bent, if the machine operated there would be some bowing or deformity in the metal. If the dies were set appreciably closer together than the thickness of metal to be bent, there would be an impasse and a tremendous stress would be thrown on the machine, and that stress might break it. Steel dealt in commercially as 3/16 may vary in thickness. When the hammer is adjusted a stock piece of steel of the thickness to be bent is used to set the hammer, this piece being called a gauge. After the hammer has been set the gauge is thrown away.

"X Q. 307. And then you put in a commercial piece?

A. Yes, sir.

X Q. 308. Let's say this commercial piece has some of [fol. 183] these hard spots and also has this 9 or 10 percent extra thickness, because the steel differs, doesn't it?

A. Yes, sir.

X Q. 309. Then, you have a situation where when the die is coming down the female member is dead solid, isn't it?

A. Lays on the bed of the press.

X Q. 310. Yes. And then you have metal that is a little thicker than the die has been set for, don't you?

A. Yes, sir.

X Q. 311. Then you have that same additional stress thrown on the machine, don't you?

A. You have additional stress.

X Q. 312. Yes. And did I read you yesterday Mr. Alling's testimony about that, that that was a stress that the machine wasn't built to sustain?

A. No, sir.

X Q. 313. Let me read that to you. It won't take a moment to find it.
A. I don't remember that.

Mr. Gallagher:

'Q. If the machine could not accommodate itself to the variance which you described before in thickness of metal; is that clear to you, what I refer to?
A. Yes.'

The Witness: I agree with him.

Mr. Gallagher:

'Q. The variances that I refer to, they are commercially found in the different gauges of metal; is that clear?'

And he answered:

'Yes, sir.'

'Q. And by that you understand that I mean these variances that come in metal as it is used day in and day out?'

and he answers:

'Yes.'

X Q. 314. That is perfectly clear?
A. To me.
X Q. 315. Couldn't be mistaken?
A. No, sir.

Mr. Gallagher: And then it goes on:

'Q. Now, I repeat, if the machine could not in ordinary operation be readily adjusted to these variances you might have in some degree an unusual stress, might you not?'

And he answered:

'Yes.'

X Q. 316. That you agree with?
A. Yes, sir.

Mr. Gallagher: Perhaps I had better read a question or two before.

'Q. As this machine was built, it was necessary to adjust [fol. 184] the hammer to accommodate the different thicknesses of sheet metal to the bend?

A. Yes, sir.

Q. And the maladjustment of the hammer, poor adjustment of the hammer, if that is clear to you, incorrect adjustment of the hammer, do you understand what I mean?'

And he said:

'Yes.'

'Q. And such adjustments would throw greater stresses on the machine than to properly adjust it?'

And he answered:

'Yes, it would throw greater stress on the machine.'

X Q. 317. Do you agree to that?

A. I surely do.

Mr. Gallagher: And then:

'Q. If you adjusted the hammer for a 5/16 thickness of metal and worked upon a 3/8 thickness of metal you would probably have trouble with the machine, wouldn't you?'

And he answered:

'Yes, the clutch would slip.'

The Witness: Yes, I agree to that.

Mr. Gallagher: I will break in on that for a moment.

X Q. 318. That is a very marked difference in thickness, 5/16 and 3/8—3/8 is 6/16—that is a whole sixteenth of *of* an inch, isn't it?

A. Yes, sir.

X Q. 319. Of course, if you made a great big maladjustment like that, that clutch would slip and the machine might stall; that is true?

A. Yes, sir.

X Q. 320. Where you come to different variances that I have spoken of in hardness and thickness, that comes in commercial sheets; is that clear to you what I refer to?

A. Yes, sir.

X Q. 321. That is too fine for a workman to adjust with his eye?

A. No, sir.

X Q. 322. That is, a workman can notice the difference in this thickness between the gauge and the pressed working piece?

A. Yes, where this is [indicating].

X Q. 323. All right. I spoke about the thickness of an exhibit yesterday, I think it was OO; it was on your letter paper. I want just for the record to get the thickness of this piece of paper. Are you familiar with this little instrument here [indicating micrometer]?

A. I have used them.

[fol. 185] X Q. 324. That is called a micrometer, isn't it?

A. Yes, sir.

X Q. 325. Will you use it?

A. [Witness measuring with micrometer.] About ten-thousand-s of an inch.

X Q. 326. You think it is about ten?

A. That is very thin.

X Q. 327. Only ten-thousandths or so?

A. One-tenth of a thousandth.

X Q. 328. Only ten-thousandths of an inch?

A. Yes. It is very thin.

X Q. 329. Now, this little instrument can also be used for measuring metal, can't it?

A. Yes, sir.

X Q. 330. By the way, do you note a little extension at the end here?

A. Some of them have it and some not.

X Q. 331. What is that?

A. An adjustment.

X Q. 332. A little safety device, isn't it, that clicks?

A. Friction.

X Q. 333. Clicks as you get the adjustment, so that you won't press the metal?

A. Yes, sir.

X Q. 334. That makes that foolproof?

A. People not accustomed to using it, it is better than without it.

X Q. 335. You can't maladjust that, can you?

A. Not very well. That is about as perfect as Brown & Sharpe makes them.

X Q. 336. They will click like that [illustrating] as soon as you get your adjustment. Now, do you think that work-

men in adjusting your press, or in operation, if there was a little variance in the thickness of the metal of the degree of the thickness of Exhibit OO, could tell that?

A. Yes, sir.

X Q. 337. All right. Let me go to another subject for just a moment, and then I won't have to read this again. Do you remember my asking Mr. Alling this question:

'Q. And as this machine was built it was necessary to adjust the hammer to accommodate the different thickness of sheet metal to the bend?

A. Yes, sir.'

X Q. 338. Do you remember that?

A. Yes, sir.

X Q. 339. Were you present while the Alling deposition was being taken?

A. Yes, sir.

X Q. 340. And you had counsel there representing you?

A. Yes; right next to you I stood.

[fol. 186] X Q. 341. Did Alling say anything about adjusting the clutch?

A. Yes, sir. You just read it a minute ago. He said the clutch might slip.

X Q. 342. He said the clutch would slip if you had a difference of 1/16 of thickness, didn't he?

A. Yes, but it couldn't slip if it wasn't adjusted.

X Q. 343. Perhaps this is clear to you. When I was inquiring of Mr. Alling about how you adjusted this machine for Bending, did I say to him: 'As this machine was built it was necessary to adjust the hammer to accommodate the different thicknesses of sheet metal to be bent?' And he said: 'Yes.'

A. Yes.

X Q. 344. Did he ever say in the course of that deposition it was necessary to adjust the clutch to accommodate the different thicknesses?

A. I don't remember what he didn't say or did say.

The Court: Mr. Ohl, let me ask you a question. As I understand your clutch mechanism, you adjust once for all?

The Witness: Once for all for that grade or thickness of metal.

The Court: Supposing you are first bending quarter-inch and then go to some other, you have to adjust your clutch again?

The Witness: Only when it is thicker. When it is thinner you don't.

X Q. 345. That brings us to the next matter. Suppose you have to work on 3/16-inch material, like this blotter here [indicating]. You set the clutch for the 3/16-inch material, don't you?

A. Yes.

X Q. 346. What do you use, a trial piece, a gauge?

A. A piece of scrap that would measure 3/16, and then lay it in on the side of the die so it would shape and leave room.

X Q. 347. Having made that adjustment you never change your clutch for 3/16, do you?

A. No, sir.

X Q. 348. As long as you work the 3/16 you can leave your clutch right that way?

A. Yes; if you have that set with the dies, as I have just explained.

X Q. 349. Now, supposing that piece of metal that you are working on, that 3/16, has this commercial variance we have described.

A. Yes, sir.

[fol. 187] X Q. 350. And differs in thickness from the gauge—you don't touch your clutch—that clutch doesn't do anything?

A. No, sir.

X Q. 351. Any adjustment for that must come through the hammer?

A. Any adjustment of that—the clutch would slip if *if* you put anything bigger. Your question—supposing the variation was greater in the center—this clutch would slip because it wasn't set for that variation.

X Q. 352. I see. Suppose the piece, the gauge, you put in to be thinner than the piece of work, the clutch would not slip?

A. No, sir, it would not.

X Q. 353. The clutch then wouldn't act as a safety?

A. Yes, sir; just the same but it wouldn't be called upon."

[Two photographs of the power press in question were marked as "Exhibits PPP" and "QQQ."]

"X Q. 354. Now, there are three arrows in this machine, on that piece of paper, suspended and pointing to different

things. Those are not part of your machine, these arrows, are they?

A. No, sir.

Mr. Gallagher: I will, with your Honor's permission, number these arrows.

The Court: All right.

X Q. 355. Exhibit PP is a photograph taken of what—the shaft assembly?

A. The flywheel shaft assembly.

X Q. 356. And between the arrows 2 and 3 there appears a disc; what is that?

A. The friction disc.

X Q. 357. And below that appears to be two shoes.

A. Two friction brake shoes.

X Q. 358. Those are the brake shoes you spoke of?

A. Yes, sir.

X Q. 359. Now, arrow 2 points to what?

A. It points to two square-head set screws in the hub of the friction disc on the left-hand side, facing the photograph Exhibit PPP.

X Q. 360. Does arrow No. 1 point to the location of that bushing that you have referred to here?

A. No, sir.

X Q. 361. That XX——

A. No, sir.

X Q. 362. Where is XX bushing located on that machine?

[fol. 188] Mr. Friedman: On the machine or in the photograph; which do you mean?

Mr. Gallagher: I will withdraw that question.

X Q. 363. Where are XX and YY located, indicating, if you will, what portion of the machine shows in the photograph?

A. It doesn't show in the photographs. You can't show it on the photograph because it is inside of the friction pulley.

X Q. 364. That is what I say—in what part of the machine?

A. Arrow No. 1 shows the collar that moves the friction pulley in and out to obtain the power to raise and lower the hammer. The cast iron bushing and the bronze bushing, the two exhibits you mentioned here, are not shown here.

X Q. 365. On this sketch here, the blueprint Exhibit 30, the clutch is shown, but it is shown set in a fixed position?

A. What clutch?

X Q. 366. Is the clutch assembly shown on this blueprint?

A. Yes, sir; the clutch is the area over here, to the right of the blue print.

X Q. 367. Now, does that clutch move about the shaft down here, the flywheel shaft?

A. Don't you mean the friction pulley?

X Q. 368. Yes. You mean that. Call it that.

A. Forget about the clutch. This is the friction pulley. This moves back and forth; when the wooden blocks engage the cast iron ring on the flywheel they push from friction through a collar and move that back and forth. When you don't want the power, move your lever in this direction, so that the friction pulley slips back and forth on that bronze bushing. The bronze bushing is brought over the cast iron bushing which supports it. This moves back and forth, the same as I can show you on the model [indicating]; this moves back and forth, this friction pulley on the flywheel. The paper is there just the same as on this model, and when it is moved back it disconnects and when the brake lever is neutral no damage can happen. When you push in you get this power to raise the hammer. It is a friction pulley.

[Mr. Gallagher shows jury Exhibits PPP and QQQ.]

X Q. 369. The arrow marked No. 1 points down to the [fol. 189] general location of this bushing; that is true, isn't it?

A. Yes, underneath the friction pulley hub. It is inside of it in fact.

X Q. 370. So that this bearing YY moves?

A. No, sir; the pulley moves.

X Q. 371. Over this [indicating]?

A. On that bearing and revolves around it at the same time.

X Q. 372. So this bearing takes two thrusts—it takes a thrust that way [indicating] and a revolving thrust?

A. It does nothing of the kind. It doesn't take a thrust either way.

X Q. 373. All right. Perhaps there is something in the word 'thrust' that I don't get. When that bearing is up

there [indicating on Exhibit 30] and you throw your clutch in and out, is there any movement about the bearing?

A. No, sir, not on the bearing.

X Q. 374. Well, in the location of the bearing is there any movement?

A. No, sir; it can't move. It is between the housing of the flywheel and the flywheel bracket. You can't move any of its parts.

X Q. 375. What is this part that you are referring to, that moves back and forth?

A. That is the friction pulley.

X Q. 376. And moves away from this bearing [indicating]?

A. Slips across the top of it.

X Q. 377. That is why you have that bronze bearing there?

A. Just because the cast iron won't do.

X Q. 378. The bearing is for the purpose of standing the wear at a given point?

A. Yes, sir, wear.

X Q. 379. So the mere placement of that bearing there indicates there is wear at that point?

A. No, sir; there can be seizure without any wear. Cast iron and bronze will run together but cast iron and cast iron will not run together.

X Q. 380. It doesn't make any difference whether this Exhibit XX is split up into six different parts?

A. No, sir.

X Q. 381. Just as good?

A. I won't say it is just as good, but we can run it for five years. I will guarantee it.

X Q. 382. I thought you said it was just as good?

A. I said I might break that in two places, and drive it in there back again in its place between the bearing and the housing, and it can move horizontally, and the purpose for [fol. 190] which it is intended will be satisfactory."

The witness testified with reference to this exhibit that what counsel termed blow holes do not affect it for the intended purpose; that they are little sand holes, not blow holes; that blow holes do not make any difference unless they get very big; that when this plant receives castings from the foundry they are inspected by tapping with the hammer to

find out if there are any holes in the casting, and if there is a hollow sound it indicates a blow hole; that his company expects blow holes in castings, the small ones making no difference as they "take care of that in making heavy patterns to overcome these expectations."

"X Q. 383. Now, wasn't the end of this Ohl press made of special construction because of the bowing in the centers?

A. No special construction. It is a standard article that we make, a standard machine that we make for this line of work. Such construction was made for 19 years before Smith purchased his machine."

In this machine because of the width of the opening in the stanchions the stanchions were made heavier than in the standard 10 foot six press; that there is no heavier load with such stanchion than with straight stanchions supporting the machine.

The witness testified that, in testifying on direct examination about the repairs made by Hovasse as shown in Exhibit TT, that one of the boltings he referred to as faulty construction was not on the broken end of the machine.

X Q. 384. So you were criticizing a repair on the part of the side of the machine that wasn't broken, to this jury?

A. Yes, sir.

X Q. 385. We will come to that. When you testified yesterday with respect to this weak repair, you testified to a repair on the unbroken side of the machine?

A. I testified to what you showed me with your finger pointing to it.

X Q. 386. It is on the unbroken side of the machine?

A. It is on the other housing, right under the right-hand housing; yes, sir.

X Q. 387. And you did not testify with respect to the repair on the broken end of the housing, did you?

A. I did refer to it some way. I even spoke about the repairs being made on that left housing so you lost two-foot [fol. 191] room, and I spoke about the plates being on there, and I spoke about the better way I could repair that.

X Q. 388. That was 'electro-welding', was it?

A. That is one of the ways.

X Q. 389. That is your best way, wasn't it?

A. No, sir; I didn't say that.

X Q. 390. What was the best way.

A. The rods over the top of the housing, down through a 2-inch brake, to cross the top of the housing with a large nut would be a job much better than those plates bolted in here where these bolts shear off. It wouldn't take any room, cost less, and be a better job if you wanted a repair job. I also mentioned it in the job of repairing the housing."

On redirect examination the witness testified as follows:

By Mr. Friedman:

"Q. 391. Mr. Ohl, in answer to some of the questions that you were asked by Mr. Gallagher in connection with the breaking of the machine on the second stroke, after it had performed one downward movement, with the hammer,—I want to call your attention to the description of that in the report of Professor Swett and Mr. Townsend which is Exhibit 20. I will read from page 3 of that report:

"Examination of the breaks show that the material is of fair composition and apparently homogeneous. Further, the cross-sectional area at the break is sufficient to withstand the maximum operating load of the machine to a reasonable factor of safety. The conclusion which must be drawn is that an excessive load was applied. An excessive load would be easily applied if the adjustment of the position of the stroke of the plunger was such as to give to the closing of the die an amount very slightly in excess of the proper distance required for thickness of stock to be bent. This could have been readily brought about by a desire to squeeze the plate to an additional amount to try and offset the bowing condition produced in the bent plate previously described. Also, a repetition of this slight excessive closing of the die from previous [fol. 192] operation had weakened the machine in a vital spot and eventually caused the rupture."

Now, is your position any different from the position which is stated by the professors in the report?

A. No, sir.

Mr. Gallagher: I object to that as leading.

The Court: That is excluded.

Q. 392. Well, do you disagree in any way with the position and statement of the professors in that report?

Mr. Gallagher: That I object to.

The Court: That is excluded.

Mr. Friedman: Your Honor is saving my exception to all these exclusions.

The Court: All right.

Q. 393. If you assumed that the machine had been operated before the professors were there and the break occurred in such a way as to produce——

The Court: Now, Mr. Friedman, I don't think—isn't this the place where the break occurred on the second time that the hammer came down?

Mr. Friedman: Yes.

The Court: Well, Mr. Ohl said that couldn't be. Mr. Ohl has said that that couldn't be, that the machine would break on the first or not at all.

The Witness: Yes, sir.

The Court: So I don't think you are entitled to ask him anything about what the professors said. The whole thing is contrary to what he said and I exclude it. The professors said this thing broke on the second stroke of the hammer and Mr. Ohl says that is impossible, as I understand it.

Mr. Friedman: I don't think your Honor correctly stated it.

The Court: Didn't you say so, Mr. Ohl?

The Witness: The first stroke had the greatest pressure and may have started the fracture and by coming down the second time it might have finished this fracture, so the report, the noise, could have occurred on the second, if the [fol. 193] first stroke did not completely fracture. For instance, when it started to go across the housing inside and around and not quite finish it, and you came down the second time, and there is less pressure there, no argument there, then, the second might have finished it and then made the report like a shot.

Q. 394. But it didn't do the whole business?

The Court: Then you may inquire something about it.

Q. 395. Just explain what you mean by saying that coming down the second stroke in and of itself would not have

caused the machine to break. Give a full explanation of your position on that.

Mr. Gallagher: I assume I can cross-examine, your Honor, on this now.

The Court: Yes.

Q. 396. Go ahead.

A. Putting a piece of ⅜ metal between three-inch dies,—we will assume, if I can, you have not the clearance in the dies for bending the material you are putting in,—the greatest strain is at the first stroke to bend the fibres, and if you start a fracture and don't complete it, when you come down on the second time without any adjustment of the pressure of the hammer, or anything at all, and keep the same distance between the dies, and using the same material, there is still a chance on the second stroke to finish that fracture and make the noise which wouldn't be made the first time if the fracture wasn't complete. A fracture may last ten years before they break, and if I may explain——

Q. 397. Go ahead.

A. I have seen castings——

Mr. Gallagher: I object.

Q. 398. Not what you have seen.

A. Castings can have a fracture that will continue for ten years before they will finally break, but they have been started through excessive strains previously and then continue on until they finally snap.

Q. 399. Now, Mr. Ohl, when you are talking of the adjustment of your hammer by your trial of a piece of metal——

A. Yes, sir.

Q. 400. If the operator is experienced and competent does he or does he not in that adjustment make any allow- [fol. 194] ance for the commercial variances in the particular thickness of metal which he is proposing to operate on?

A. He puts a piece of scrap in so it is loose and not tight, and if after making the first bend finds that the angle is not acute enough, we have a hand wheel here that he can adjust and give it paper-thickness more if not beyond the capacity of the machine and adjustment of the

clutch. The only time an experienced operator will notice stuff too thick going in is when it keeps grunting just a little bit [illustrates with a low sound]; when they make a heavy grunt, that is a telephone to him that he shouldn't continue, and a real hard grunt—you are straining the machine.

Mr. Gallagher: When he is adjusting his machine?

The Court: I suppose it is the pig iron that grunts.

[Brief recess.]

Q. 401. Now, Mr. Ohl, this is the question I want to ask you: When your competent and experienced mechanic is making his adjustment with his trial piece of steel, getting his stroke, and his dies arranged, does he make any allowance there for the commercial variance in the kind of material that he is proposing to use?

A. Yes, sir.

Q. 402. How does he do that?

A. By taking a small scrap piece and putting it on the side of the dies and see that they are loose and that they are not tight. He sees they are put in loose and he knows then with a little variation that looseness will overcome any additional strain on the slight variation of thickness or greater variation.

Q. 403. In his test he makes that allowance?

A. That is how we set the hammer first.

Q. 404. Now, there is another thing——

The Court: Now, there is one thing, Mr. Friedman, I don't understand about this.

Mr. Friedman: All right.

The Court: And that is the adjustment of the clutch. I understood Mr. Ohl to say that you adjust the clutch differently for a quarter of an inch and a three-eighths inch—perhaps I got him wrong.

[fol. 195] The Witness: You adjust the clutch for a quarter and you never can put in anything thicker but you can put in thinner. If you adjust for three-eighths you can put in a quarter-inch. You are talking of the clutch?

The Court: Suppose you have a quarter, and you want to put in a bigger piece, three-eighths, what do you do?

Mr. Friedman: Just illustrate.

The Court: What do you do with your clutch?

The Witness: If the press is adjusted with reference to the clearance in the dies and the adjustment of the clutch for a quarter-inch and you are starting work on a 5/16 sheet, you adjust your hammer higher up. You take a piece of scrap that is five-sixteenths, and you put it in between the dies seeing that you have clearance enough, that it is in there loose, and that that don't wedge in, and then you loosen these four screws in your clutch so that they are loose, and tighten it up just enough to run the machine. You come down on the sheet and say you bend it on an eighth of an inch depression and your clutch slips, you tighten up the cams again which tighten the clutch cheeks with the wooden inserts a little more. After a while you come down and the clutch slips, you tighten up the cams in the clutch cheeks a little more.

The Court: I don't understand why you should have to change your clutch for different thicknesses.

The Witness: Otherwise you won't have the safety. If you put a 5/16 piece in there and it is set for a quarter inch safety it is going to slip and you will never bend the 5/16. You have got to get in more friction, more stress on the sheets than it requires for a quarter. If you had that strain on when you formed a quarter inch you wouldn't have a safety. You would have a five-sixteenths adjustment for the quarter inch. And if you happened to get something in there on the side of the hammer above that bending a quarter inch, a maladjustment, you are going to break some castings.

Q. 405. Then you say, or do you say, that if you adjust it for 3/8, and you wanted to bend a quarter, that the clutch [fol. 196] won't hold hard enough to do it?

A. No; it will hold too hard, but it won't hurt, because if you have the right die in clearance your clutch won't slip, when bending 3/8, because you have smaller material that won't take the pressure that the 3/8 will. If you set the clutch and the hammer to form 3/8 material, and then you have a job that comes in that you want 5/16 on, which is 1/16 less, you don't have to touch the clutch, because your machine will stand that strain at which the clutch is set, the same strain as on the 5/16, the dies having always the clearance, and the material will not take the pressure to bend 5/16 that it will on 3/8, so you have all the protec-

tion to bend heavier that is good enough and not beyond the capacity of the machine when you bend lighter pieces.

The Court: Then, if you go up the clutch will slip.

The Witness: If you put in seven-sixteenths and you set it for a three-eighths, you are beyond your capacity and the clutch will slip.

The Court: In other words, your clutch has got to be tighter to bend the heavier piece?

The Witness: Yes; more power.

The Court: I have got it through my head this time, I think. That is, in other words, whenever you want to set heavier material than the machine is adjusted for at the time, you have got to make a readjustment of the clutch?

The Witness: Yes, sir.

Q. 406. There are times when if you want to set just—you want to use just one-sixteenth different, but lighter, material, you do not necessarily have to adjust the clutch?

A. You don't have to touch the clutch.

Q. 407. But you adjust the clutch when you are going from lighter to heavier material?

A. Yes, sir.

Q. 408. Now, I think I have got that through my head a little. Now, what I want to have you explain also is your talk about adjusting or setting the hammer and using this hand-wheel. Just explain how you operate it and at what stage you operate it.

A. If you want to set within a paper thickness, we will [fol. 197] say, the die, closer together, instead of throwing the hand lever in here with the power, you simply turn this hand wheel and that will give you, as I say, an adjustment on the top of an Ingersoll watch so you won't break the glass. That is a very fine adjustment that the operator uses this for. If he finds he is not down far enough and has not got the right angle, we will say, he will come down a little further, provided he has got room in the die. When he comes down the limit with that hammer, which will be the second, third, or fourth stroke, we will say, and the next piece acts different he must come down a little more to the clearance of the die. If there is any bowing outward he don't want to come down any more and that piece has got to be taken on a straight bed and bent with a hammer by workmen before he ships it away

from the plant. That's the way it is done all through the United States.

Mr. Gallagher: Can that go out, 'That's the day it is done all through the United States'?

The Court: That may go out.

Q. 409. Now, when you want to get that hammer adjusted, first you can use the machine for the first movement up and down?

A. You can see with your eye how much clearance you have got.

Q. 410. Now, is this the place [indicating]?

A. Look through either end generally.

Q. 411. Do you use this [indicating]?

A. This is the handle we use that thrusts this friction pulley in and that raises and lowers the hammer.

Q. 412. It is attached to this machine?

A. Through this mechanism.

Q. 413. Of lowering and raising the hammer?

A. Yes, through the screws.

Q. 414. Now, after you have got this adusted so that you think you have got it pretty nearly right, then you begin adjusting it by hand, using this [indicating] hand wheel that I am now having under my finger; is that correct?

A. For the final adjustment.

Q. 415. For the final stages?

A. Yes, sir.

Q. 416. All right. Now I want to ask one other thing, [fol. 198] please. You said in answer to Mr. Gallagher when he was asking about that 16-inch bushing, something about 6/1000 of an inch clearance on the space where the oil was. Will you explain that a little more so that I can understand it?

A. That gauge we use for boring out the hole for the tool steel shaft, annealed, is larger—.0156 in decimals, which means one-sixty-fourth of an inch clearance on each side of the shaft for a film.

Q. 417. One-sixty-fourth?

A. Well, the measurement in decimals is .0156. That means 1/64th of an inch on each side, which is what we leave for a film of oil to be around the shaft, the revolving shaft.

The Court: On which side? The thing is cylindrical, isn't it?

The Witness: Well, I say each side of the diameter.

Q. 418. That is, it is the difference—it is twice .0156 difference between the diameters of the two?

A. Yes, because you have to have a film of oil on both sides of the shaft, both diameters; it wouldn't do to have it only on one side.

Mr. Friedman: Yes, but you put it as if that weren't round.

Recross-examination.

By Mr. Gallagher:

X Q. 419. Now, let's see if I have got your present position right on the breaking. It is your opinion that there was, before it actually broke, some overload put on the machine that brought that portion of the frame that broke pretty near the point of fracture?

A. Yes, sir.

X Q. 420. And that overload was probably put on when the machine was put under the greatest load, wasn't it?

A. Yes, sir.

X Q. 421. Now, it may have been put on down in Newark?

A. It might have been.

X Q. 422. That's where the machine was used to bend 3/8 on a 2-inch die?

A. Yes, sir.

X Q. 423. And that's where a load was put in the machine 50 percent more than it was supposed to have?

A. No, I won't say that.

X Q. 424. Perhaps, I am wrong about the figure. Was it 30 percent--one-third, was it? I have it right here. It [fol. 199] took 50 percent more to bend on a 2-inch die than a 3-inch die; didn't you say that?

A. On the same material or the same machine?

X Q. 425. Yes.

A. Yes; that's my idea of it.

X Q. 426. So a greater load was put on that machine right down in Newark in your plant when a 2-inch die was used to bend 3/8 material?

A. Yes, sir.

X Q. 427. And that load was about 50 percent more?

A. Yes, sir.

X Q. 428. Than the normal load?

A. That's my idea, 50 percent more.

X Q. 429. And when that load was put on the machine, the clutch was adjusted for a 3/8-inch thick bend, wasn't it?

A. Yes, sir.

X Q. 430. And the clutch was shipped assembled?

A. Yes, sir.

X Q. 431. So that there was no need before the operation of the machine to set the clutch?

A. No, not at anything less than 3/8.

Mr. Friedman: I didn't get that.

[The question and answer are repeated.]

X Q. 432. Only for 3/8?

A. Yes, sir.

X Q. 433. If the clutch had not been touched and that adjustment had not been changed?

A. Yes, sir.

X Q. 434. And it broke as it did in the fall?

A. Yes, sir.

X Q. 435. Then that break was not due to any failure to adjust the clutch?

A. Not in adjusting the clutch; no, sir.

X Q. 436. Now, you testified yesterday that the clearance, the difference in diameter between Exhibit UU and the shaft that went into it was 6/1000 of an inch, didn't you?

A. For a film of oil. I testified for a film of oil.

X Q. 437. Now, that would be a difference on each side of half of that, 3/1000 of an inch, wouldn't it?

A. No; it would be a film of oil on each side.

The Court: Twice that, I should think.

The Witness: One sixty-fourth on each side is 1/32 of the diameter of the——

Mr. Gallagher: I think I am right this time, your Honor.

[fol. 200] X Q. 438. The diameter, you said. That means from outside there [indicating] to outside here [indicating]?

A. Yes, sir.

X Q. 439. And the difference in the two diameters was 6/1000 of an inch?

A. No, sir; I said that was what we need for a film of oil.

X Q. 440. I thought you testified yesterday, and I think I have taken it down verbatim, that the difference in the diameter between that bearing and the shaft—the diameter was fitted to a block of collars and that collar is 6/1000 of an inch less than the diameter of the bearing.

A. Less on each side. You have got to have that room for oil.

X Q. 441. Is that what you said?

A. That's what I meant, if I didn't say it. That's what I meant.

X Q. 442. You said 'diameter'.

A. Well, I said on each side, too. I should have said each side.

X Q. 443. You should have said side?

A. Yes.

X Q. 444. Now, 6/1000 of an inch is the way you leave it now as the clearance between the inside of this bearing and the shaft (Exhibit UU)?

A. On both sides.

X Q. 445. All around?

A. Yes, sir.

X Q. 446. And that's the only oiling clearance?

A. Yes, sir.

X Q. 447. If it was 3/1000 of an inch, that wouldn't be enough?

A. That would be more.

X Q. 448. 3/1000 of an inch?

A. Yes.

X Q. 449. Is more than 6/1000 of an inch?

A. Well, wait a minute; 31——

The Court: You are wrong there.

The Witness: This you mean—about 3/1000.

X Q. 450. Now, a 64th of an inch is almost 16/1000, isn't it?

A. Whatever the decimals are—we don't use the decimals so much. We use a 64th.

X Q. 451. That's what you needed to permit oil to go around it.

A. It could have been less.

X Q. 452. I see it. I am told by Mr. White that on the United States army specifications there was some underlining on it that was made objectionable.

[fol. 201] The Court: All right.

Mr. Gallagher: I have taken that out now.

Mr. Friedman: I object.

The Court: I will allow it and save your exception.

[United States Army, Ordnance Department, Metal specifications, January, 1924, marked "Defendant's Exhibit RRR".]

Mr. Gallagher: There is just one more question with respect to that which I want to ask and I am done. Exhibit RRR is the United States Army Ordnance Department metal specifications, June, 1924, high test gray iron casting—I won't bother to read it to you gentlemen now. I just want to ask a question or two. On page 2 there is a little calculation here of three kinds of castings. First, a light casting, then a medium casting, and heavy casting.

X Q. 453. Do you know that, Mr. Ohl?

A. Yes, sir.

X Q. 454. Now, on page 1 there are three classifications, and then, in the other column, 'Identification'; do you note that light castings—'those having no section less than one-half inch thickness'—this wasn't a light casting?

A. Heavy.

X Q. 455. Heavy casting. 'Those having no section less than two inches in thickness'—that's the kind this was?

A. Two and one-half inch, or regular.

Mr. Friedman: Your Honor appreciates this is the Navy or Army definition of the term.

Mr. Gallagher: They are used throughout the country.

X Q. 456. And for heavy castings, the tensile strength, minimum, is 30,000 pounds a square inch, isn't it?

A. Yes.

X Q. 457. Now, just one or two more questions. When you had this machine, this casting, delivered to you the hole through which the shaft that I now indicate, the flywheel shaft, was to rest in had not been machined out?

A. Which, the hole in the housing?

X Q. 458. Yes.

A. No, sir, not when it came in. It came right in from the foundry.

X Q. 459. You machined it out?

A. Our boring mill did.

X Q. 460. Did you have a test made on the strength of the casting then; did you?

A. No.

[fol. 202] Mr. Gallagher: That's all.

Redirect examination.

By Mr. Friedman:

Q. 461. Mr. Ohl, this Exhibit RRR is the general specifications. 'General specifications' for metal products No. 5020 issued by the Ordnance Department, in effect as of the date of opening the bid, which form part of the specifications—have you ever seen any of those pamphlets?

A. No.

Q. 462. Have you ever bid for Government work?

A. Yes, sir.

Q. 463. Sold some of your presses to the Government?

A. Every United States Navy Yard has got one of these presses. There are three of them in the Charlestown Navy Yard, passed at the factory by their inspectors.

Mr. Gallagher: That I ask to go out. That's good sales talk.

The Court: That may go out.

Q. 464. Did you in talking with Mr. Smith——

The Court: That is excluded. If the definitions there are different in the trade you may bring it out. If not, you may not.

Q. 465. I am showing you a pamphlet that I have had marked for identification with Mr. Brown's signature, which Professor Marks identified as issued by the American Society for Testing Materials. Do you recognize that?

A. I don't know anything about that.

Q. 465a. You don't know whether——

Mr. Gallagher: He said he didn't know.

The Witness: I have practical experience.

The Court: Never mind that. If he knows that these requirements are different from what the trade usually knows,—you needn't show him any more society pamphlets. If they are different, and he knows it, bring it out.

Mr. Friedman: I think I will offer ours and let it go at that. Professor Marks identified it and talked about it.

The Court: All right, you may.

[Discussion at the bench.]

Mr. Friedman: I offer this.

[Pamphlet of the American Society for Testing Materials marked 'Plaintiff's Exhibit 32'.]

[fol. 203] Q. 466. Mr. Ohl, you have no means of knowing what pressure or what strength that Ohl machine was put to after it got to the Smith factory, have you?

A. No.

Q. 467. And of course it would make a great deal of difference whether the biggest pressure was put on in your place or in the Smith place, and if the clutch was properly or improperly adjusted in the Smith plant, would it not?

A. It would.

Mr. Gallagher: I don't understand that question. All right. He has answered it.

Q. 468. That is, the wrong adjustment of the clutch in the Smith plant might subject your machine to unusual and unnecessary strain?

A. Yes, sir.

Q. 469. Or the wrong adjustment of clearance in the dies in the machine?

A. Yes, sir. A big difference.

Q. 470. Would that subject it to an unusual and unnecessary stress?

A. Yes.

Mr. Friedman: I think that's all. I think we rest, your Honor.

The Court: What?

Mr. Friedman: We rest.

The Court: All right."

Harold C. Mann, called by Smith in rebuttal, testified:

I am research engineer for the Watertown Arsenal of the United States Government, not acquainted with Smith or Ohl. I made tests of certain materials for Smith on the Riele tensile testing machine of Exhibits OOO-1, -2, -3 and -4.

"Q. 1. What did that test reveal?

Mr. Friedman: I object.

The Court: Is it in evidence where those things came from?

Mr. Gallagher: I thought it was. Perhaps I may be in error.

Mr. Witte: I think that was identified by one of the witnesses as having come from a portion underneath.

Mr. Gallagher: Well, I will show——

Mr. Witte: It was during my examination.

Mr. Gallagher: I don't dare answer your Honor's question. I will show it came right from this very press.

[fol. 204] Mr. Friedman: May I be heard?

[Discussion at the bench.]

The Court: I will allow it and save your exception.

Q. 2. Now, what did this test reveal?

Mr. Friedman: I don't have to take any exceptions. Your Honor will allow them for the whole?

The Court: Yes."

The test merely revealed to us that one specimen had 25,600 and the other 26,800 pounds per square inch tensile strength. These tests were made on standard test bars conforming to Government standard on April 29th this year. The test bars were brought to me by Mr. Hovasse. I have been doing Government work since 1916 and have made this kind of test.

Q. 3. Now, with respect to the tensile strength—having a large casting, say 138 square inches in area at a cross-section—let's assume, first, it is a square block casting—where would you get the greatest tensile strength?

A. At the outside.

Q. 4. I show you Exhibit LLL, and that was a cross-section at the break. Now, assuming that the material at the outside was taken from the outside of the frame of the so-called Ohl press similar to the one in the model there except it isn't exactly like it, but somewhat similar to it, and assuming that you got the results that you did in the test, what would you say the general average tensile strength would be of that area?

Mr. Friedman: Wait a moment. What area?

Mr. Gallagher: Of the cross section. That is the same question you asked your expert, and we asked Professor Townsend. This is the outside. This gives the highest tensile strength.

The Court: All right. I will allow it and save your exceptions.

Q. 5. What do you say?

A. With the values that we obtained, on that bar, you take the outside of it, say, we wouldn't want to figure that much over 20,000 to 22,000.

Q. 6. For a general average.

A. For a general average.

Q. 7. Let me ask you whether or not there is some time a test made, taken in another way, on material?

A. Well, you either take them from coupons or in the casting itself.

[fol. 205] Q. 8. Which is the most accurate way?

A. Why, the coupons will invariably give the higher result.

Q. 9. And by coupons you mean what?

A. If you are making a casting, you simply cast a separate piece on the side of that casting."

On cross-examination the witness testified:

I was present when the tests were made, supervised them, didn't do the testing, which was done by two of my men. I do not know who made the test bars we tested. I didn't read the test machine myself. We calibrate and test these machines the first of every month for accuracy as a matter of precaution.

I don't know from what part of the machine these test bars come from. I testified on the basis of what I was told as to the place they came from. I was told they were taken from near the outside. If a test bar is taken from the section that has been overloaded it will show less strength than the section had before the overload, may be a couple of hundred pounds less.

"The Court: I want to ask one question, Mr. Mann. In the Government requirements for heavy castings, it says:

'The minimum tensile strength per square inch shall be 30,000 pounds.' That is considerably higher than in the cast iron trade, if there is such a thing, isn't it?

A. I don't think so. Our specifications have been patterned after the trade presses and I couldn't say definitely but I believe they are very closely to the latest A. S. T. M. —that is the American Society for testing materials.

The Court: All right:"

Charles J. Hovasse, recalled by Smith, testified:

I took to Mr. Mann the test bars tested by him. I took them from the broken stanchion just below the fracture at the extreme outside portion.

On cross-examination he testified:

Part of these test bars were taken out at the point of fracture. Of the two tests by Mr. Mann the bar taken from the place nearest the point of fracture showed 1,200 pounds per inch less strength than the one taken further away from the fracture.

[fol. 206] Both parties then rested.

At a recess during the trial counsel for Ohl called the court's attention — the fact that one of the jurors had been observed writing during the testimony of witnesses at the trial; and that another of the jury had been observed during the recess taking measurements of certain of the exhibits. Ohl through counsel orally requested the court to instruct the jury that such conduct was improper; that no notes of testimony or measurements of exhibits should be taken except under the instructions of the court in open court. There was no direct evidence of what the juror had been writing. The court ruled the matter immaterial and refused so to instruct the jury. Ohl duly excepted to such ruling and refusal, and the practice complained of at times was repeated.

Ohl as plaintiff then renewed the following motion which subject to Ohl's exception the court denied:

"The plaintiff moves that the defendant be required to elect whether it will proceed under its defense in this action or under its cross action being tried herewith."

Ohl as defendant then presented the following motion which subject to Ohl's exception the court denied:

"The defendant moves that the plaintiff be required to elect whether it will proceed with this action or rely upon its defense in the cross action being tried herewith."

Ohl as plaintiff then presented the following motion which subject to Ohl's exception the court denied:

"The plaintiff moves that the court herein direct a verdict for the plaintiff."

Ohl as defendant presented the following motion which subject to Ohl's exception the court denied:

"The defendant moves that the court herein direct a verdict for the defendant."

Ohl then presented the following requests for rulings:

[fol. 207] "Request for Rulings Filed by Geo. A. Ohl Co.

In these requests we refer to the first action as the Ohl case and to the second as the Smith case. These requests are made where applicable in each case.

1. Smith in neither case makes any complaint as to the dies bought of Ohl.

2. The Smith complaints in these cases concern only the machine itself.

3. Smith received, has retained, and still has the machine which Ohl delivered in performance of the contract between them.

4. In the Ohl case there was on all the evidence adequate consideration for the notes declared on.

5. In the Ohl case there was on all the evidence no total failure of consideration.

6. In the Ohl case on all the evidence the only partial failure or failures of consideration claimed by Smith arise through the alleged breaches of warranty.

7. Smith's defense in the Ohl case has the same legal effect as though that action were for a purchase price of the machine and the defense was by way of recoupment for breaches of warranty.

8. Smith may not at the same time defend in the Ohl case for a claimed failure of consideration and in the Smith case keep the machine and maintain an action against Ohl for claimed breaches of warranty.

9. Smith having elected to sue Ohl in an independent action for alleged breaches of warranty, and having elected to retain the machine, waived his defense in the Ohl case and is limited to such rights as he can establish in the Smith case.

9*a*. The contract between the parties is governed by the Sales Act.

10. The contract between Ohl and Smith is fully contained in Ohl's letter to Smith of November 9th (Exhibit 13), the specifications these referred to (a part of Exhibit 14), Smith's letter to Ohl of November 24 (Exhibit B), Ohl's letter to Smith of December 4 (Exhibit C) and its enclosure dated December 2d (Exhibit D) and the agree-[fol. 208] ment of March 1st with its attached rider dated March 9 (Exhibit A).

11. The rider of Exhibit A is an express warranty.

12. The express warranty of Exhibit A incorporates by reference to "our specifications of said press" so much of the specification of Exhibit 14 as concerns the capacity of the press stated in those specifications.

13. Those specifications expressly refer to a "bending" capacity.

14. The express warranty in this case is limited to a warranty of bending capacity.

15. The express warranty in this case is limited to a warranty of pending capacity and does not include a setting capacity as well as a bending capacity.

16. On all the evidence a machine of this type requires a greater capacity to bend and set soft steel on dies than merely to bend such soft steel on the same dies.

17. A claim of a warranty that the machine was to have a capacity to bend and set 3/8-inch soft steel (or any lesser thickness) on square dies the female of which measures three inches across the corners is inconsistent with the express language used in the express warranty which describes that capacity as for "one bend at a time," describes the machine as one "which will bend" the heavier guage of material and which will bring out "multiple bends."

18. The fact that the express warranty is for a bending capacity negatives the existence of any implied warranty that the machine would set a bend when made.

19. If the jury find that the machine had sufficient capacity to bend 3/8-inch soft steel one bend at a time on dies the female of which measures three inches across the corners, then Smith may not recover for any deficiency in the capacity of the machine.

20. On all the evidence the machine delivered to and received by Smith was of the design shown in Exhibits 13 and 14 (Ohl to Smith November 9, 1925 and enclosures, Exhibits 13 and 14).

21. There is no evidence that the design of the machine [fol. 209] in question call for any so-called safety device that was omitted in the machine when delivered.

22. The express warranty of Exhibit A does not require any so-called safety device.

23. The express warranty of Exhibit A "that the material and workmanship are of the best" does not include any warranty as to the design of the machine.

23a. The express warranty of Exhibit A that the machine has a capacity of 3/6-inch soft steel as stated in the specifications does not include a warranty as to the design of the machine.

24. If the machine had the capacity called for by the contract it is immaterial whether or not it had any device to prevent breakage when operated beyond that capacity.

25. Smith has specified that the press from the very beginning rendered unsatisfactory service in the particulars specified in Specifications 3-A to E.

26. It is uncontroverted that the press was first operated by Smith on April 15, 1926.

27. Smith herein is charged with actual knowledge beginning on or about April 15, 1926 of the claimed defects in the machine fairly within the scope of Specifications 3-A to E inclusive.

28. It is uncontroverted that the first notice to Ohl of any claim of any breach of warranty was that specified in Specification 9-A, letter of June 25, 1926. (Exhibit CC.)

29. On all the evidence Smith accepted the machine as that word is used in the *the* Sales Act.

30. The law provides that if Smith having accepted the machine failed to give Ohl notice of the breach of any promise or warranty within a reasonable time after he knew or ought to have known of such breach Ohl shall not be liable therefor.

31. Where the facts concerning the giving of such a notice are uncontroverted whether or not it is given within a reasonable time as required by statute becomes a question of law for the court.

32. The decisions of the Supreme Judicial Court of the [fol. 210] Commonwealth of Massachusetts in construing the Sales Act are binding upon this court.

33. A notice given on June 25 of breaches of warranty fairly within the scope of Specifications 3-A to E inclusive is as a matter of law not given within a reasonable time.

34. Smith may not recover for any breaches of warranty within the scope of Specifications 3-A to E inclusive.

35. The notice which the Sales Act calls for must fairly advise the seller of the alleged defects.

36. The June 25 notice (Exhibit CC) on the uncontroverted evidence of Smith erroneously refers to an alleged defect that did not then exist and that exhibit did not refer to the defect which Smith claims then existed.

37. The June 25 notice even though seasonably given was insufficient to satisfy the requirements of the Sales Act as to notice.

38. It is uncontroverted that the next notice claimed was that of August 13, 1926. (Exhibit EE, Specification 9.) That notice does not fairly advise Ohl of any alleged defect and, therefore, does not satisfy the requirements of the statute as to notice.

39. The next notice is that of August 23 which specifies a claim of failure to bend without material deflection and a defect in the clutch. (Exhibit II, Specification 9.)

40. On all the evidence the clutch defect claimed in that notice refers to a defect in the flywheel assembly, itself referred to in Specification 3-B.

41. Smith is charged with knowledge of that clutch trouble from the very beginning or from on or about April 15, 1926. (Specification 3.)

42. The August 23 notice as it concerns a claim of a clutch defect was as a matter of law not given within a reasonable time as required by statute.

43. The failure to bend material without a material deflection claimed in the August 13 notice is fairly within the scope of Specification 3-D.

44. Smith is charged with knowledge of the defect [fol. 211] claimed in that notice from the very beginning or from on or about April 15. (Specification 3.)

45. That notice as a matter of law was not given within a reasonable time as required by statute.

46. The next notice claimed is that of August 25. (Exhibit JJ, Specification 7.) That notice refers to various parts in the flywheel assembly more specifically described in the notice.

47. Smith is charged with knowledge of defective operation of that flywheel assembly from the very beginning or April 15, 1916. (Specification 3.) That notice as a matter of law was not given in time to satisfy the requirements of the statute as to notice so far as it concerns anything concerning the flywheel assembly.

48. That notice claims the 16-inch bushing was a poor loose fit and turned around. On Smith's own evidence it is uncontroverted that that bushing turned around and the looseness of fit was claimed to have been observed by Smith on April 15, 1926.

49. The August 25 notice as it concerns the 16-inch bushing was not given in time to satisfy the statute as to notice.

50. The next notice claimed is that of September 1 (Specification 9), which is specified to have been oral (Specification 10), and to have included the claimed defects defined in Specifications 11-A to E.

51. Specifications 11-C, D and E did not fairly advise Ohl of any claimed defects and are not sufficient to satisfy the requirements of the statute as to notice.

52. Specification 11-A is fairly within the scope of Specification 3-B and with that claimed defect Smith from the very beginning is charged with knowledge.

53. Specification 11-A was not a notice given within a reasonable time to satisfy the statute as to notice.

54. Specification 11-B is fairly within the scope of Specification 3-D and with that claimed defect Smith from the very beginning is charged with knowledge.

55. Specification 11-B was not a notice given within a reasonable time to satisfy the statute as to notice.

[fol. 212] 56. The next notice claimed was that of September 3. (Exhibit MM, Specification 9.)

57. That notice does not fairly advise Ohl of any claimed defect and is not sufficient to satisfy the statute as to notice.

58. Exhibit 20, the Swett-Townsend report, is not a notice given so as to satisfy the requirements of the statute as to notice.

59. That bowing of the plate after bending if due to the machine was a defect fairly within the scope of Specification 3-D with knowledge of which Smith is charged from the very beginning or on or about April 15, 1926.

60. As to that bowing, Exhibit 20 is not a notice given in time to satisfy the requirements of the statute.

61. Ohl is not responsible for any damage to the machine resulting from the tentative sub-support criticized in Exhibit 20.

62. The Smith Company is bound by and limited to matters set out in its specifications.

63. An express warranty negatives all other warranties or conditions inconsistent with it.

64. The express warranty given by Ohl to Smith as shown in Exhibit A does not contract that the machine will bend 3/8-inch soft steel to any given angle.

65. The lack of any safety device other than the 25-inch diameter friction clutch was a matter apparent to Smith at the time the machine was delivered and assembled and before April 15, 1926.

66. No notice of complaint based on any lack of a safety device other than such friction clutch prior to Exhibit 20 of November 22, 1926 is in evidence.

67. Smith may not recover for any damage due to any lack of any safety device other than the 25-inch diameter friction clutch.

68. Smith's claim is that the machine should have capacity (a) on dies the female of which is 3 inches across the corners (b) using 3/8 inch soft steel (c) to bend (d) and set the bend (e) to a 90 degree angle (f) at one operation.

[fol. 213] 69. The elements a, b and c in the foregoing request are within the express warranty but none of the elements d, e or f are within that express warranty and even if the Ohl machine could not perform d, e and f, there is no liability on the Ohl Company for breach of any warranty on that score.

70. The express warranty of the Ohl Company is in writing, in plain unambiguous language, and its construction is a question of law for the court.

71. That there is no language used in the express warranty that has any peculiar or trade meaning.

72. That there is no evidence in the case to give to any language used in the warranty any meaning other than its ordinary everyday meaning.

73. The meaning of the express warranty is that the machine is not required to do anything more than to bend ⅜-inch soft steel on dies the female of which measures 3 inches across the corner.

74. To bend metal is different from setting it. The process of bending metal does not necessarily include the process of setting.

75. The common accepted definition of 'to bend' is to bring into a curve or out of or aside from a straight line.

76. The common accepted definition of 'to set' is to put into a fixed permanent or immovable condition, position or form."

The court then charged the jury as follows:

"CHARGE TO THE JURY—LOWELL, J.

The Court: MR. FOREMAN AND GENTLEMEN: There is really very little I can say to you in this case, but I will start first by saying what you probably already know, and that is as to our respective functions, that is, my function and yours.

My function is, in the first place, to tell you the law and by that you are bound. In the second place, or, rather, the right I have in the second place is, if I care to, to give you my opinion on any witness or on the facts. But that part of the case is entirely in your hands. If I should say, for instance, that Mr. Ohl was to be believed or was not to [fol. 214] be believed, either one of the two, that statement would not be binding upon you because with you rests the deciding of the facts.

Now, the law in this case really is simple. The Ohl Company sold and warranted expressly in writing that it would bend a three-eighths piece of steel on a three-inch die. That was expressly warranted. There is also an implied warranty as it is called that the machine would do perfect work. That is simply all the law there is to it, really.

It all becomes a question of fact. There is as a question of law evidence as to whether a notice of defect was given within a reasonable time, and on that I rule that it was so given, and exception will be taken to that ruling.

So the only question here is—was that machine a reasonable and proper machine, and did it in fact bend this steel, this soft steel, in the way which the manufacturer, Ohl, agreed that it would bend that steel. All these figures are a good deal over my head, and you know all about it, and I don't, so there is no use of my pretending to you that I do, and if I try to tell you about that I would mix you up more than I myself got mixed up on it. But it is all a question of fact.

There is a minor question of bending, and the difference between bending and setting. I don't personally get the idea of what you want to set steel for, or bend it rather, without setting. I don't quite see what that amounts to, but you are the arbiters of that, and it is for you to say whether in making these risers and stringers that the iron must not only be bent but must be set. All that is within your province.

The whole thing, I say, comes down to a question of fact. Would this machine bend the iron in a proper way to turn out merchantable stair treads and risers and stringers. And, of course, there is the question of the break in that machine. It is for you to say whether it broke under a fair trial, or whether at the time that it broke it had an improper load put on it, and the machine was operating improperly. The question of the strength of the material, and what its strength really was, and what it ought to have been, is also for you. Also, there is a disputed question [fol. 215] about whether a safety device of some kind was necessary and whether this clutch amounted to a safety device in that it would slip if it was properly adjusted. Those are the questions of fact, gentlemen, on which you are the final judges.

There is a question of fact, however, which perhaps I ought to warn you about—and I am warning you about it for this reason—I think it has unduly influenced me. The Ohl Company sent to the Smith Company a young man, I am sorry to say he is now a lawyer, named Dailey. I will admit I have been somewhat prejudiced against the Ohl Company in my own mind on account of their witness Dailey, and I really think I ought to warn you not to be too prejudiced against the Ohl Company for their mistake in sending that liar to the Smith shop to look at that machine,

because it is natural for you and me to love the truth, and think very badly of Mr. Dailey. I think you ought not be unduly prejudiced against the Ohl Company from the fact that that man was sent there.

Now, in the first place, there are two cases here. It has been treated all along as if there were only one, but there are two. In the first place, the Ohl Company sues for the balance of the note which has not been paid. As we have the figures, the Smith Company has paid in the neighborhood of $5,000, $4,963 to be exact, and there are notes still due of $6,504. The first suit is to recover that amount of the notes. The second suit is by the Smith Company, to recover back that sum of money which they paid—that $5,000, and in addition to recover a certain amount which they had paid for repairs, and so on, on the machine. The Smith Company keeps the machine. The Smith Company has not said that the dies were improper; they have said that the machine is no good and will not do the work that they promised it would do, and they say it isn't worth the $5,000 that they spent for it. Now, it is up to you to say on this whole case—in the first place, did the machine do or would the machine have done, if properly handled and operated, the work in turning or bending these soft steel plates? If you [fol. 216] find that it would do that, then your verdict must be for the Ohl Company for the full amount of what they are suing for.

If, on the other hand, you find the machine would not do it, you then must make up your minds what that machine is worth in its present condition, or what it would have been worth, rather, at the time before it was broken, what a machine like that machine, which wouldn't do quite what it was agreed to do—what that would have been worth at the time before it broke.

There is some evidence as to the present value of that machine, and you may find on that what it is. And then, when you have found that amount, you may also find for the plaintiff for the sum of money which they spent in fixing up the flywheel in one case and also the repairing of the machine. As I have the figures here, they are $2,431.75.

So, with the Smith Company having paid nearly $5,000 and having spent nearly $2,500, you will find what the machine is worth, and if it is worth less than the $5,000 they paid, you may find a verdict for the difference for the Smith

Company, and in addition to that you may add to it the amount which they spent for repairs in the neighborhood of $2,500. I think that is all I need to say, gentlemen.

The verdicts, gentlemen, are to be signed by the foreman and we have a printed form here. In the first case, the George A. Ohl & Company v. Smith Iron Works,—if you find for Ohl in that case, the Ohl Company, you sign the verdict which says the jury find for the plaintiff and assess damages in the sum of whatever amount you may find.

If you find for the Smith Company in that first case, the foreman signs the verdict which says the jury find for the defendant.

The same thing is true in the other case of the Smith Iron Works v. The George A. Ohl & Company. If in that case you find for the Smith Iron Works, the foreman signs the verdict which says that the jury find for the plaintiff, and then you add the damages which you find. If, however, in the second case, you find for the Ohl Company, the foreman signs the verdict saying that the jury find for the defendant."

[fol. 217] [Discussion of the bench.]

"The Court: Mr. Foreman and gentlemen, my attention is called to this, which I neglected to tell you. If you find for the Smith Iron Works, I told you that you might find in a certain amount for the repairs to the machine. My attention is drawn to the fact that there is evidence that such repairs might have been done in a cheaper manner. It is for you to say about that. There is sometihng about welding the machine into position or something with an electric welder, if that was the name, which would cost less, and some other evidence along that line, which I have forgotten. So, it is for you to find whether this figure, $2,431.75, is a reasonable figure for repairs or whether they should have had the repairs done at a less cost. That is all I care to say, gentlemen."

Exceptions to Charge

The court refused all of Ohl's requests except numbers 1 and 31, to which refusals to rule Ohl excepted.

Ohl excepted to the charge as follows, to so much thereof as stated:

A. There was an implied warranty that the machine would do perfect work.

B. That is simply all the law there is to it.

C. I rule that notice of the defect was given within reasonable time.

D. That the only question was whether that machine was reasonable and proper and did in fact bend this steel in the way Ohl agreed it would bend that steel.

E. That is all a question of fact.

F. That there is a minor question of bending and a difference between bending and setting; that the court doesn't personally get the idea of what you want to set steel for or bend it without setting it.

G. That the court doesn't see what that amounts to; that it is for the jury to say whether in making these risers and stringers that the iron must not only be bent but must be set.

H. That the whole thing is a question of fact. Would this [fol. 218] machine bend the iron in a proper way to turn out merchantable stair treads, risers and stringers?

I. That it is for the jury to say whether the machine broke under a fair trial or whether at the time it broke it had an improper -oad on it and was being operated improperly.

J. That it is for the jury to say what the machine really was and what it ought to have been. That the disputed question as to whether a safety device was necessary and whether this clutch amounted to a safety device is a question for the jury.

K. That Ohl made a mistake in sending that liar Dailey to Smith's.

L. That is up to the jury to say on the whole case would the machine if properly handled and operated do the work in turning or bending these plates.

M. That the jury consider the worth of the machine in its condition before it was broken.

N. That the jury may find the present value of the machine.

O. That the jury might find for Smith for the sum spent in repairs to the flywheel and in repairing the machine.

P. That the jury is to find what the machine is worth.

Q. That the jury may find in addition for Smith the cost of repairs in the neighborhood of two thousand five hundred dollars ($2,500).

R. To the charge as a whole in that it did not adequately instruct the jury on the issues raised by the pleadings, specifications, evidence, and requests for rulings.

S. That the charge failed to present to the jury the issues of the case.

T. That the charge failed to give to the jury instructions to guide them in the issues of law involved in the case and raised by the evidence and Ohl's requests for instructions.

U. That the charge failed to instruct the jury as to its verdict in the Ohl v. Smith case in the event it found the machine not as the contract called for.

The case was then submitted to the jury, who later returned a verdict for the defendant in the first case, Ohl v. [fol. 219] Smith, and in the second case, Smith v. Ohl, a verdict for the plaintiff in the sum of seven thousand five hundred dollars ($7,500).

Certain exhibits introduced and submitted herewith under stipulation are herein incorporated by reference in addition to those set forth in the foregoing bill.

Wherefore George A. Ohl Company, being aggrieved by the above rulings, refusals to rule, admissions and exclusion of evidence, prays that this its bill of exceptions in each of the two cases be allowed.

Lee M. Friedman, by Friedman, Atherton, King & Turner, Its Attorneys.

Assented to.

Martin Witte, Robert Gallagher, Attorneys for A. L. Smith Iron Works, Plaintiff and Defendant.

Allowed August 20, 1930.

J. A. L., D. J.

IN UNITED STATES DISTRICT COURT

Law. No. 3210

GEORGE A. OHL & CO.

v.

A. L. SMITH IRON WORKS

Law. No. 3267

A. L. SMITH IRON WORKS

v.

GEORGE A. OHL & CO.

STIPULATION WITH REFERENCE TO EXHIBITS RE APPEAL—
Filed August 8, 1930

In the above-entitled cases it is agreed that the following original exhibits be not printed as part of the record but that originals or copies approved by counsel be transmitted by the clerk of the District Court to the clerk of the Circuit Court of Appeals for the First Circuit to be used by that court as a part of the original record herein:

1. Exhibit D, confirmation from George A. Ohl & Co. to [fol. 220] A. L. Smith Iron Works, dated December 2, 1925, of order for machine and accessories.

2. Exhibit K, Smith's letter to Ohl of January 9, 1926.

3. Exhibit P, Ohl's blueprint No. 490 showing various types of dies and being one of the enclosures referred to in Exhibit 13, Ohl's letter to Smith of November 9, 1924.

4. Exhibit X, a blueprint and typewritten instructions for setting up the machine.

5. Exhibit SS, Ohl's blueprint No. 331, called the foundation plan.

6. Exhibit TT, a photograph of the machine in question taken after the break and repairs, from a position facing the rear of the machine.

7. Exhibit WW, Smith's photograph of the 16-inch bushing.

8. Exhibits BBB, CCC, DDD, EEE, FFF and GGG, Smith's photographs of the machine after installation and break.

9. Exhibit HHH, an outline diagram of the broken stanchion referred to in the Perkins report, Exhibit NNN.

10. Exhibit LLL, a cross section diagram of the stanchion at point of fracture.

11. Exhibit OOO; it is especially stipulated these were four pieces of metal originally comprising two test bars made according to the specifications shown on Exhibit RRR figure 2 and from material taken from the outside surface of the stanchion that broke at the point of fracture.

12. Exhibit PPP, Smith's photograph of that part of the machine where the brake member was that was broken.

13. Exhibit QQQ, being Smith's photograph similar to PPP.

14. Exhibit RRR, the United States Army Ordnance Department Metal Specifications.

15. Exhibit TTT, being Smith's photograph of the material removed from the outer surface of the broken stanchion at point of fracture from which test bars Exhibit OOO were made.

16. Exhibit UUU, being Smith's further photograph of material removed for test bar purposes.

[fol. 221] 17. Exhibit 14, six blueprints, which accompanied the two typewritten pages of specifications set forth in the bill of exceptions and being the additional enclosures referred to in Exhibit 13.

18. Exhibit 17, a like confirmation dated January 18, 1926 covering dies.

19. Exhibit 28, the foundry test record with reference to the stanchion that broke.

20. Exhibit 29, the foundry test record concerning the second stanchion.

21. Exhibit 32, the pamphlet of the American Society of Testing Materials.

Lee M. Friedman, Friedman, Atherton, King & Turner, Attorneys George A. Ohl & Co. Martin Witte, Robert Gallagher, Attorneys A. L. Smith Iron Works.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF EXCEPTIONS CONCERNING PLAINTIFF'S MOTION FOR NEW TRIAL—Filed May 21, 1930; allowed August 20, 1930

The plaintiff herein duly filed within the required time its motion for a new trial of which a copy is attached hereto, and duly served a copy thereof on opposing counsel. The motion was brought forward and heard by the court on May 14, 1930, and subject to the plaintiff's exception was overruled and denied.

The motion was based upon evidence, facts, rulings, refusals to rule, instructions, and verdict more fully set forth in this plaintiff's main bill of exceptions, and in the final substitute therefor as allowed, which so far as material hereto by reference is incorporated herein and made a part hereof. It also was based in part upon the statement after verdict by the foreman and one other of the jury to one of counsel for Ohl in substance that they intended by their verdicts to have the unpaid notes declared on in Ohl v. Smith applied as credits against the $7,500 verdict in Smith v. Ohl.

Wherefore, George A. Ohl & Co., being aggrieved by the [fol. 222] above ruling and denial, prays that this its bill of exceptions herein be allowed.

Lee M. Friedman, Friedman, Atherton, King & Turner, Its Attorneys.

Assented to.

Martin Witte, Robert Gallagher, Attorneys for Defendant.

Allowed August 20, 1930.

J. A. L., D. J.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PETITION FOR APPEAL AND SUPERSEDEAS—Filed November 25, 1930

Considering itself aggrieved by the final judgment of your court entered in the above entitled cause against it, and in favor of the above-named defendant, A. L. Smith Iron Works, on the eighth day of September 1930, George A. Ohl & Co., the above-named plaintiff, a corporation duly organized and existing under the laws of the State of New Jersey, and having its usual place of business in Newark in said New Jersey, hereby prays that an appeal be allowed to the United States Circuit Court of Appeals for the First Circuit. In connection with this petition the petitioner herewith presents his assignment of errors.

Your petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the cause, and that there be entered an order fixing the amount of the bond on such appeal.

George A. Ohl & Co., by Lee M. Friedman, Friedman, Atherton, King & Turner, Its Attorneys.

[fol. 223] Above petition for appeal is allowed this twenty-fifth day of November 1930.

James A. Lowell, United States District Judge.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ASSIGNMENT OF ERRORS—Filed Nov. 25, 1930

The plaintiff in this section assigns as errors those assignments set forth in the assignment of errors in action A. L. Smith Iron Works v. George A. Ohl & Co., Law No. 3267, adopts the same as its assignment of errors herein and by reference incorporates the same herein.

Lee M. Friedman, Friedman, Atherton, King & Turner, Its Attorneys.

Bond on appeal for $250.000, approved and filed November 25, 1930, omitted in printing.

[fol. 224] In United States District Court

Plaintiff's Præcipe for Transcript of Record—Filed November 25, 1930

1. Writ and return.
2. Declaration, omitting counts 2 to 13 and Exhibits B to L all inclusive and substituting therefor the following: "Counts 2 to 12 both inclusive are on the defendant's promissory notes Exhibits B to L both inclusive, omitted herein, as they are the same as Count 1 and Exhibit A except that each such note is one month later in date of payment than the preceding."
3. Defendant's answer.
4. Plaintiff's motion for specifications.
5. Jury empanelled.
6. Plaintiff's motion for election and order.
7. Plaintiff's motion for directed verdict and order.
8. Jury verdict.
9. Plaintiff's motion for new trial.
10. Plaintiff's bill of exceptions.

[fol. 225] 11. Hearing on motion for new trial and order.
12. Plaintiff's bill of exceptions with reference to motion for new trial, omitting therefrom the copy of the motion for a new trial attached.
13. Plaintiff's petition for appeal.
14. Plaintiff's assignment of errors.
15. Plaintiff's bond on appeal.

Lee M. Friedman, Friedman, Atherton, King & Turner, Its Attorneys.

November 25, 1930.

Service of the above præcipe is hereby acknowledged and the right to file a cross præcipe is waived.

Martin Witte, Attorney for A. L. Smith Iron Works, Defendant.

Citation, in usual form, showing service on Martin Witte, omitted in printing.

[fol. 226] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 227] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 3267, Law Docket

THE A. L. SMITH IRON WORKS, Plaintiff,

v.

GEORGE A. OHL & Co., Defendant

WRIT OF ATTACHMENT AND SERVICE

MASSACHUSETTS DISTRICT, *ss:*

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of George A. Ohl & Co., a corporation duly organized under the laws of the State of New Jersey, and domiciled in and having a usual place of business in Newark, New Jersey, Defendant, in our District of Massachusetts, to the value of ten thousand ($10,000) dollars, and summons the said defendant (if it may be be found in your district) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Mas-
[fol. 228] sachusetts, on the third Tuesday of March, 1928, then and there, in our said court, to answer unto The A. L. Smith Iron Works, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and domiciled in and having an usual place of business in Chelsea, in an action of contract to the damage of the said plaintiff (as it says) the sum of ten thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Bos-

ton, the seventh day of December, in the year of our Lord one thousand nine hundred and twenty-seven.

Mary E. Prendergast, Deputy Clerk.

Acceptance of Service on Writ

Boston, December 7, 1927.

Due and sufficient service of the within process is hereby accepted by me on behalf of the within named defendant.

George A. Ohl & Co., by Lee M. Friedman, Friedman, Atherton, King & Turner, Its Attorneys.

The writ in this cause is dated the seventh day of December, A. D. 1927, and was duly entered at the March Term of this court, A. D. 1928, when and where the parties appeared by their respective attorneys.

In United States District Court

Declaration—Filed March 20, 1928

And the plaintiff says that on or about the first day of March, 1926 it entered into a written agreement with the defendant, drawn in the form of a lease, for the purchase and sale of one (1) standard 12-foot 6-inch 103,000 pound power press and six sets of dies for a total purchase price of $12,014.68, title to which machine was to remain in the [fol. 229] defendant until said purchase price was paid in full; that by the terms of this agreement the defendant let unto the plaintiff the aforesaid press for a term of eighteen months from March 1, 1926 for a total rental of $12,009.68, to be paid by the plaintiff as follows: $1,000 in cash with order, $1,000 when machine was ready for delivery and $250 in cash with the order for the dies (all of which, amounting to $2,500, was paid at the time the aforesaid agreement was executed) and the balance of $9,759.68 by eighteen negotiable monthly notes, the first note for $545.68 and the remaining seventeen for $545 each, the first note payable 30 days from the day of this agreement and the remaining notes at successive monthly intervals, said notes not to be considered as payment until they were actually paid in cash with interest at six per centum per annum;

that the defendant further agreed that if the plaintiff performed certain covenants more particularly set out in the aforesaid agreement and made no default in the payment of the aforesaid sums, and if the lease was not sooner terminated by mutual consent or otherwise, it would, on the payment to it by the plaintiff of the additional sum of five dollars, execute and deliver to the plaintiff a bill of sale for the said machine and its accompanying dies in consideration of this payment of five dollars and of the sum of $12,009.68 that was paid as rent.

That by a rider dated March 9, 1926, attached to the aforesaid agreement and made a part thereof, the defendant warranted that the press had the capacity stated in the defendant company's specifications of the said press, namely, that it would bend ⅜-inch soft steel on square dies the female of which measured 3 inches across the corners, and that the material and workmanship was of the best.

A copy of said agreement with the rider attached thereto is hereto annexed marked "A" and expressly made a part hereof.

That the plaintiff is engaged in the business of fabricating, manufacturing and installing architectural, ornamental and structural steel and ironwork and that it purchased said power press for use in its factory, all of which [fol. 230] facts were well known to the defendant; and that in making said purchase the plaintiff relied upon the warranty as aforesaid.

That the said machine, a ponderous machine weighing well over fifty (50) tons capable of exerting a pressure of 800,000 pounds, was delivered to the plaintiff at its place of business at 217 Everett Avenue, Chelsea, and that it was properly set up and installed by the agents and servants of the plaintiff under the supervision of its master mechanic; that from the very beginning the said press rendered unsatisfactory service and in no way accomplished the purposes for which it was purchased nor did it conform to the warranties and specifications hereinabove referred to; that it failed to bend properly sheets of soft steel ⅜ of an inch in thickness, and that the sheets thus bent showed a decided bowing in two directions, a material deflection that made it impossible to use them without employing additional man power after each operation to recover these sheets from the deflection; that the results were

the same even when sheets of steel less than ⅜ of an inch in thickness were used; that the press developed mechanical defects that were directly traceable to poor material and workmanship; that as a direct consequence and result of poor material and workmanship and while the machine was being used on sheets of steel much less in thickness than the ⅜ of an inch thickness that the machine was guaranteed to bend, the end upright or stanchion at the opposite end of the motor broke in two places, rendering the machine unfit for use without extensive and expensive repairs.

That the plaintiff notified the defendant of various imperfections as soon as they became apparent and that it continued to apprise the defendant of the various developments hereinabove referred to; that it followed the suggestions that were made by the defendant and took every possible precaution in the operation of the press, but that all steps proved unavailing; that it continued payments to the defendant under the aforesaid agreement for five months in the hope that the press would perform according to the warranty and specifications that accompanied it; that in all other respects the plaintiff performed its part [fol. 231] of said agreement; and that finally, on or about the twelfth day of August, 1926, it notified the defendant that it would refrain from making any further payments under the aforesaid agreement until the press was put into the condition required by the specifications and warranty.

That said machine has greatly depreciated in value as a result of its failure to conform to the warranty and specifications as aforesaid; and that as a natural consequence and proximate result of the unsatisfactory operation and improper construction of the press as aforesaid the plaintiff suffered and incurred great losses in its business, and was put to great expense in repairing said press and in having to send work outside to be done which could otherwise have been performed on said press in the plaintiff's factory, all of which was in the contemplation of the parties to the agreement of the sale at the time it was entered into. All to the damage of the plaintiff as set forth in its writ.

By its Attorney, Marvin Witte.

[Memorandum.—Copy of agreement, marked "Exhibit A", referred to in the foregoing declaration as annexed, is here omitted as said agreement is made part of the substituted bill of exceptions, and will be found printed on page 11 of this Transcript of Record.—James S. Allen, Clerk.]

In United States District Court

Defendant's Answer—Filed March 29, 1928

The defendant admits that it entered into a contract in writing with the plaintiff under date of March 1, 1926 of which contract a copy is annexed to the plaintiff's declaration, and that it delivered to the plaintiff the power press and dies in said contract defined and that the cash and notes called for by said contract to be delivered by the plaintiff to the defendant were so delivered. Otherwise than is above specifically admitted each allegation, item and particular in the plaintiff's writ and declaration contained is denied as fully and effectually as if each and the same were herein specifically set forth and separately denied. [fol. 232] And further answering the defendant says that the material called for by said contract in writing was examined, inspected and tested by the plaintiff and was accepted by the plaintiff as a proper delivery in satisfaction of the defendant's obligations prior to the physical delivery thereof by the defendant to the plaintiff.

Friedman, Atherton, King & Turner, Its Attorneys.

In United States District Court

Defendant's Motion for Specifications—Filed May 19, 1928

The defendant moves that the plaintiff be ordered to specify as follows:

1. The date upon which the press described in the plaintiff's declaration was set up and installed by the plaintiff as in page 2, last paragraph of the declaration, alleged.

2. The date when said press was first operated by the plaintiff after being set up and installed by the plaintiff.

3. In what particulars from the very beginning the press referred to in the plaintiff's declaration rendered unsatisfactory service as alleged in the plaintiff's declaration, page 2, last paragraph.

4. In what particulars said press failed to accomplish the purposes for which it was purchased as alleged in the plaintiff's declaration, page 2, last paragraph.

5. In what particulars said press failed to conform to the warranties and specifications referred to in the plaintiff's declaration and as alleged in that declaration, page 2, last paragraph.

6. In what particulars said press failed properly to bend sheets of soft steel ⅜ inch in thickness as alleged in the plaintiff's declaration, page 2, last paragraph, and page 3, first paragraph.

7. In what particulars the press developed mechanical defects that were directly traceable to poor material and workmanship as alleged in the plaintiff's declaration, page 3, first paragraph.

8. In what particulars the workmanship and material was [fol. 233] poor in said press and which resulted in the breaking of the press as alleged in page 3, first paragraph of the declaration.

9. The date of each notice alleged in paragraph — page 3. of the declaration.

10. Whether each such notice was written, oral or in part written and in part oral.

11. Set forth the material parts of each such notice as was wholly or partially oral.

12. Set forth when, where and to whom representing the defendant each notice that was wholly or partially oral was given.

By its Attorneys, Friedman, Atherton, King & Turner.

Also at the same term, to wit, June 4, 1928, the plaintiff's answer to the defendant's motion for specifications was filed.

This cause was thence continued from term to term to the December Term, A. D. 1928, when, to wit, December 7, 1928, a motion was filed to amend plaintiff's answer to defendant's motion for specifications and was assented to, plaintiff's amended answer to defendant's motion for specifications being as follows:

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S AMENDED ANSWER TO DEFENDANT'S MOTION FOR SPECIFICATIONS—Original answer filed July 4, 1928; amended December 7, 1928

[MEMORANDUM.—Copy of plaintiff's amended answer to defendant's motion for specifications is here omitted, as it is made part of the substituted bill of exceptions, and will be found printed on pages 8 to 11 of this Transcript of Record.—James S. Allen, Clerk.]

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES OF TRIAL

This cause was thence continued to the March Term, A. D. 1929, when, to wit, April 16, 1929, issue having been joined, a jury was duly empanelled to try the issue, the Honorable James A. Lowell, District Judge, sitting.

Said cause was thereupon set down for hearing and was tried with case No. 3210, Law Docket, George A. Ohl & Co., Plaintiff, v. A. L. Smith Iron Works, Defendant, on the seventeenth, eighteenth, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth and thirtieth days of April, A. D. [fol. 234] 1929, and on the first, second, third and seventh days of May, A. D. 1929.

On the said twenty-fifth day of April, A. D. 1929, the following Motion for Election was filed by the defendant, and denied by the court:

IN UNITED STATES DISTRICT COURT

MOTION FOR ELECTION—Filed April 25, 1929

The defendant moves that the plaintiff be required to elect whether it will proceed with this action or rely upon its defense in the cross action being tried herewith.

Friedman, Atherton, King & Turner, its Attorneys.

Also, on the same day, the following Motion for Directed Verdict was filed by the defendant and denied by the court:

IN UNITED STATES DISTRICT COURT

MOTION FOR DIRECTED VERDICT—Filed April 25, 1929

The defendant moves that the court herein direct a verdict for the defendant.

Friedman, Atherton, King & Turner, its Attorneys.

IN UNITED STATES DISTRICT COURT

VERDICT—May 7, 1929

The jury find for the plaintiff, nd assess damages in the sum of seventy-five hundred dollars ($7,500).

Fred H. MacDonald, Foreman.

[fol. 235] IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR NEW TRIAL—Filed May 9, 1929

The defendant in this action now moves that the verdict of the jury be set aside and moves that a new trial be granted on the following grounds, to wit:

1. One of the jurors during the trial took notes concerning evidence and testimony and used the same during the deliberations of the jury.

2. One of the jurors took notes during the arguments and used the same during the deliberations of the jury.

3. One or more of the jurors took measurements of exhibits during trial recesses and referred to the same during the deliberations of the jury.

4. The verdict as it concerns the plaintiff's damage is excessive.

5. The verdict as it concerns the plaintiff's damage is against the evidence.

6. The verdict as it concerns the plaintiff's damage is against the weight of the evidence.

7. The verdict as it concerns the plaintiff's damage is against the law and the evidence.

8. The verdict as it concerns the plaintiff's damage is against the law.

Lee M. Friedman, Friedman, Atherton, King & Turner, its Attorneys.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES OF HEARING

This cause was thence continued from term to term to the September Term, A. D. 1929, when, to wit, September 30, 1929, a draft bill of exceptions was filed by the defendant within extended time.

This cause was thence continued from term to term to the March Term, A. D. 1930, when, to wit, May 14, 1930, said cause was set down for hearing on the aforementioned motion for new trial, the Honorable James A. Lowell, District Judge, sitting, and it was ordered that said motion for new trial be overruled.

[fol. 236] At the same term, to wit, May 21, 1930, a draft bill of exceptions concerning defendant's motion for new trial was filed and assented to.

This cause was thence continued to the present June Term, A. D. 1930, when, to wit, August 8, 1930, a substituted bill of exceptions on behalf of George A. Ohl & Co.,

applying also to the aforementioned case No. 3210, Law Docket, is filed and assented to.

On the said eighth day of August, a motion to amend substituted bill of exceptions is filed.

Also on the said eighth day of August, A. D. 1930, a stipulation with reference to exhibits re appeal is filed.

On the twentieth day of August, A. D. 1930, the substituted bill of exceptions, the motion to amend substitute bill of exceptions, and the bill of exceptions concerning plaintiff's motion for new trial are allowed.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Thereupon, to wit, September 8, 1930, it is considered by the court, the Honorable James A. Lowell, District Judge, sitting, that the said A. L. Smith Iron Works, plaintiff, recover of the said George A. Ohl & Co., defendant, the sum of seventy-five hundred dollars ($7,500) damages, together with interest amounting to six hundred and one dollars and twenty-five cents ($601.25), and its costs of suit taxed at —.

IN UNITED STATES DISTRICT COURT

No. 3210, Law Docket

GEORGE A. OHL & Co.

v.

A. L. SMITH IRON WORKS

No. 3267, Law Docket

A. L. SMITH IRON WORKS

v.

GEORGE A. OHL & Co.

Substitute Bill of Exceptions on Behalf of George A. Ohl & Co.—Filed August 8, 1930; amended and allowed August 20, 1930

[MEMORANDUM.—Copy of substitute bill of exceptions on behalf of George A. Ohl & Co. is here omitted as it already

appears of record in case No. 3210, Law, and will be found printed on pages 7 to 219 of this volume.—James S. Allen, Clerk.]

[fol. 237] In United States District Court

Defendant's Bill of Exceptions Concerning Defendant's Motion for New Trial—Filed May 21, 1930; allowed August 20, 1930

[Memorandum.—Copy of defendant's bill of exceptions concerning motion for new trial is here omitted, as it is identical with the one printed in case No. 3210, Law Docket, with the exception of the word "defendant" to be inserted in place of "plaintiff", and will be found printed on pages 221, 222 of this volume.—James S. Allen, Clerk.]

In United States District Court

Stipulation with Reference to Exhibits re Appeal—Filed August 8, 1930

[Memorandum.—Copy of stipulation as to exhibits is here omitted, as it already appears as part of the transcript of record in No. 3210, Law Docket, and will be found printed on pages 219 to 221 of this volume.—James S. Allen, Clerk.]

In United States District Court

Defendant's Petition for Appeal and Supersedeas—Filed November 25, 1930

Considering itself aggrieved by the final judgment of your court entered in the above-entitled cause against it, and in favor of the above-named plaintiff, A. L. Smith Iron Works, on the eighth day of September, 1930, George A. Ohl & Co., the above-named defendant, a corporation duly organized and existing under the laws of the State of New Jersey and having its usual place of business in Newark in said New Jersey, hereby prays that an appeal be allowed to the United

States Circuit Court of Appeals for the First Circuit. In connection with this petition, the petitioner herewith presents its assignment of errors.

Your petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the cause, and that there be entered an order fixing the amount of the bond on such appeal.

George A. Ohl & Co., by Lee M. Friedman, Friedman, Atherton, King & Turner, Its Attorneys.

[fol. 238] Above petition for appeal is allowed this twenty-fifth day of November, 1930.

James A. Lowell, United States District Judge.

In United States District Court

Law. No. 3267

A. L. Smith Iron Works

v.

George A. Ohl & Co.

Law. No. 3210

George A. Ohl & Co.

v.

A. L. Smith Iron Works

Assignment of Errors—Filed Nov. 25, 1930

This assignment is filed by George A. Ohl & Co. physically in the first of the above actions and by reference in the second. George A. Ohl & Co. is referred to as "Ohl" and the A. L. Smith Iron Works as "Smith".

Ohl's assignment of errors are as follows:

1. The court erred in admitting testimony of conversations prior to the execution and delivery of the written contract declared on by Smith in part as follows:

Mr. Smith as Smith's witness on direct:

"Q. As near as you can fix it now—we will assume it was later than October—could you tell what talk you had?

[Discussion at the bench.]

The Court: I will allow it and save your exception.

Mr. Friedman: Save my exception to all the oral conversation prior to the date of the written contract declared on.

The Court: All right.

Q. Now, will you state if you can the substance of your first talk with Mr. Ohl with reference to this machine?"

The witness then testified:

"I visited Ohl's plant, asked to be shown through, asked a lot of questions about what the machines would do and told him what I wanted. The whole conversation naturally hinged on the machine. I cannot remember just what took place. I told Ohl I wanted a 12-foot 6-inch press and he replied, 'I can build it for you.' I told him I wanted a ma-[fol. 239] chine strong enough to bend ⅜ plates and he said, 'Yes, I can build one for you that will bend ½ inch.' We were looking at a 10-foot machine and he took me to see some 10-foot machine patterns and said, 'I can make that 12 foot 6 inches long.' I told him we wanted this machine for our Chelsea factory. I asked him whether his machine is as strong as a steel frame machine and he said, 'If I thought the other makes of machine made out of steel were better than mine I would make mine out of steel too.' I had never had any experience in making machines. I told Mr. Ohl what my line was, telling him substantially as described on the witness stand."

The witness had previously described that business as follows:

"The company is engaged in structural steel, ornamental iron business and at times in special work, buying the raw material in lengths for structural and in bars or sheets for ornamental purposes in carload lots shipped to the plant where it is fabricated according to plans, specifications and details. The machine in question relates only to the ornamental department operating on structural steel

plates, of all sizes, but in the ornamental department we usually use from ⅜ of an inch thick down. We commonly used from 1/16 inch thick and less up to 5/16. This steel is purchased under thickness or gauge specifications. It is placed on a machine and bent to form stair stringers or the sides of a stair upon which the tread and risers are riveted. The tread and risers are formed on the same machine on different dies of the same material. This is called ornamental work and the company generally installs it in the building where it is to be used under bids and according to plans and specifications. The stringers are usually bent to a 90 degree angle or square. It makes a difference whether the workmanship is straight or bowed. Bowing means that the plate after being bent is not perfectly straight but bowed on the edge; deflection is the [fol. 240] bending under pressure of the machine which straightens out when the pressure is removed; both bowing and deflection refer to lack of alignment; spreading means the angle is not perfectly square with the sides out of line."

Ohl said he had built machines all his life and sold them all over the world.

A week or two later when I gave the order Ohl said to me:

"If that machine didn't bend three-eighths you can have the machine for nothing, which he never did; that is, he didn't give me the machine for nothing."

"Q. About the lifetime of the machine. Anything said of that sort?

A. Well, there was a guarantee that it would do the work.

Q. No. I am asking you what was said by Mr. Ohl, if anything, about how long the machine would last and what work it would do?

A. Well, he prided himself on the fact that he had machines 40 and 50 years old."

On cross-examination as to such conversations he testified:

"Q. I ask you only to give us the conversation which took place between you and Mr. Ohl on November 23, 1925, when you went there the second time to his factory, after

you had gotten all these blueprints, and all this, and when you closed the business with him?

A. Well, I will try to recollect the best I know how. I told him I wanted a machine that will bend our stringers up to three-eighths.

Q. You told him that the first time, didn't you, Mr. Smith?

Mr. Gallagher: Wait a moment. Pardon me. May the witness complete his answer?

The Court: Yes, go on.

The Witness: I told him I wanted a machine that will bend material without getting it out of shape, or bending it to shape as per our specifications up to three-eighths of an inch, 12 foot long. That was the most sensible thing because the original machine of Mr. Ohl's was only a 10-[fol. 241] foot machine, and this was a 12-foot 6 machine. I am very positive of that. In fact, that is where the conversation came in with Mr. Ohl—'Is your machine as good as a steel machine, because I had conversation with him about a steel machine and that is about the same as Mr. Ohl's press.' I was preferring to buy a machine nearer home. The other party, by the way, was out west. I impressed on Mr. Ohl the importance of having a machine that would bend my material up to three-eighths of an inch thick, and 12 foot long. That was the most important thing. As I have already mentioned, Mr. Ohl's answer was—I don't know about the exact words— 'If I thought a steel machine, after being in business so long, if I thought a steel machine was better than a cast iron machine I would build it out of steel myself.' Then, of course, we consummated the sale.

Mr. Friedman: Now, if your Honor please, I ask that all be stricken out?

The Court: I will allow it and save your exception.

Q. Was anything said in that interview between you and Mr. Ohl about the specifications that he had sent you to Boston on the 9th of November?

A. I believe that the specifications had been mentioned.

Q. Did you tell him that those specifications were satisfactory?

A. I don't remember whether I said it in those words, but the specification is satisfactory to me if it will do what it says it will."

2. That the court erred in its ruling admitting the following question:

"Q. Did you by these specifications understand you were to get anything suitable for the work you described?

Mr. Friedman: Wait a minute; I object.

Mr. Gallagher: The basis has been laid here by this cross-examination.

The Court: I will allow it and save your exceptions.

A. Decidedly so, before." [Smith, redirect.]

[fol. 242] 3. That the court erred in its ruling admitting the following question:

"Q. Now, can you understand how anybody reading Exhibit CC, anyone having any mechanical learning, could have understood that trouble was limited to the flywheel bearings and not transmitted through the shaft to the disc?

Mr. Friedman: Just a minute.

The Court: I will allow it and save your exceptions.

A. No." [Hovasse, redirect.]

4. That the court erred in refusing to permit the identification on Exhibit TT of the locus of trouble referred to in Exhibit CC as follows:

"Q. Will you mark this Exhibit TT?

The Court: Don't mark it yet until I pass on it.

Q. In ink to show the outline of the place where the bearing in the letter of June 25, Exhibit CC, is located.

The Court: That I refuse because the letter has been shown to be in error. I will save your exception." [Hovasse, cross.]

5. That the court erred in excluding the following question:

"Q. I am going to ask you just another thing. You say you have worked these presses up in the——

A. Osgood-Bradley Car Company.
Q. The Osgood-Bradley plant?
A. Car Company.
Q. And did you have long pieces there?
A. Sixty-five to 70 feet long, some of them.
Q. And how heavy metal?
A. Quarter-inch up to three-eighths.
Q. And do you find that when such pieces come through the press they have no bowing in them?

Mr. Witte: Just a moment. Are you now referring to Osgood-Bradley?
Mr. Friedman: Yes. I am testing this man's experience.
Mr. Witte: Then I am objecting to the question.
The Court: I will exclude it.
[fol. 243] Mr. Friedman: Will your Honor save my exception? Shall I make an offer of proof?
The Court: No, you needn't.
The Court: I refuse it and will save your exception."
[Carron, cross.]

6. That the court erred in admitting the following question:

"Q. In the particular machine in question did or did you not have dfficulty in bending one-quarter inch stock at a 90-degree angle without bowing?

Mr. Friedman: I object.
The Court: I will allow it.
Mr. Friedman: Your Honor will allow my exception?
The Court: Yes.
[The question is read.]
A. Yes, sir." [Carron, redirect.]

7. That the court erred in admitting the following question:

"Q. Now, what do you say in your judgment would be the probability of your being able to bend three-eighths stock at a 90-degree angle without bowing?

Mr. Friedman: I object to that.

Q. In view of your experience on quarter-inch stock?

Mr. Friedman: I object to that.
The Court: I will allow it and save your exception.

The Witness: I don't think that the machine could bend three-eighths stock over a die two and one-quarter inch-wide. [Carron, redirect.]

8. That the court erred in admitting the following question:

"Q. Now let me ask you this question: Whether or not in your opinion it would be possible on that machine, with the experience you had with it, to bend three-eighths inch stock at a 90-degree angle on that same die that you used for your quarter-inch without showing bowing?

Mr. Friedman: I object to that.
The Witness: No, sir.
Mr. Friedman: Save my exception.
[fol. 244] The Court: Yes.
Mr. Witte: The answer is no, sir. You said no, sir." [Carron, redirect.]

9. That the court erred in admitting subject to Ohl's exception the testimony:

"There was no safety device on the machine as there are usually in machines of this type." [Townsend, direct.]

10. That the court erred in admitting the following question as to repairs to the broken stanchion:

"Q. What was the total cost of that?

Mr. Friedman: Does your Honor allow that?
The Court: Yes, and I will save your exception. Go ahead with the total.
The Witness: $1,858.31." [Lerner, direct.]

11. That the court erred in admitting the following question:

"Q. And I will ask you whether or not that is proper construction in your opinion in a metal-forming press to operate it without or cause it to be operated without some sort of a safety device. We will assume that the press, this metal-forming machine, is called upon to bend anything up to three-eighths commercial steel in dies 2¼ inches across and downward at angles of 90 degrees or less?

Mr. Friedman: To that I object.

The Court: I will allow it and save your exception. Is it proper to use such a die without a safety device?

Mr. Witte: Such a machine?

The Court: Such a machine.

The Witness: With proper allowances in its construction, yes.

Q. Proper allowances in what?

A. In its construction.

Q. What do you mean by that?

A. I mean by that by additional material, of stiffer nature, either being inserted or shrunk into the casting of which this machine may be designed.

[fol. 245] Q. In other words, if the factor of safety is great enough?

A. Is great enough." [Perkins, direct.]

12. That the court erred in admitting the following question:

"Q. As a result of these computations you made and the different consultations you had with Townsend, what conclusions did you come to as to the factor of safety that was provided for in this Ohl machine?

Mr. Friedman: That I object to.

The Court: I will allow it and save your exceptions.

The Witness: From our observations and our calculations we decided that the machine was far below in factor of safety to properly do the three-eighths by twelve-foot section it was designed or guaranteed to do." [Perkins, direct.]

13. That the court erred in admitting the following question:

I have seen an Ohl press, not of the 12 foot type except the one at the Smith plant. I have seen the lighter types, 8 to 10 foot long.

"Q. Bearing that in mind, that Ohl machine of 8 or 10 feet, and add to it 2 feet, and assume in all other respects it is the same as the 10-foot machine, except that it is 12 feet, and will take a 12-foot piece, and that it was expected to bend up to 3/8ths, or 3/8ths metal, 12 foot, on square dies, the female of which measures 3 inches across, and that the

machine was of the general type that is pictured in these prints that I show you marked 'Exhibit 14'—bearing that in mind, and then, bearing in mind what you saw of that machine and its operations, and bearing in mind that was delivered in March of 1926, and then take into account what you saw of that machine and its limitations and infirmities in March, 1928, and bearing in mind all of the infirmities that you know about the machine, what, in your judgment, was the fair value of that machine in March of 1926?

Mr. Friedman: I object to that.
The Court: 1926.
Mr. Witte: Yes, 1926.
[fol. 246] The Court: I will allow and save your exception.
The Witness: Knowing that the——
Mr. Friedman: Pardon me just a moment.
The Court: You may answer.
The Witness: Knowing the deformities——
Mr. Friedman: No.
The Court: What is the fair valuation?
The Witness: What I place as fair valuation?
Mr. Witte: Yes.
A. I have got to assume those deductions.
Mr. Witte: Yes, come to the net results.
A. Net results—I would say about $2500." [Perkins, direct.]

14. That the court erred, Smith having rested, in denying Ohl's motion—

That Smith "be required to elect whether it will proceed under its defense in this action or under its cross action being tried herewith".

15. That the court erred, Smith having rested, in denying Ohl's motion that Smith—

"Be required to elect whether it will proceed with this action or rely upon its defense in the cross action being tried herewith."

16. That the court erred in excluding the following question:

"Q. Have you the right housing the same way?
A. Yes.

The Court: That I exclude. We are not interested in the right housing. I exclude it and save your exception. Go ahead.

Mr. Friedman: All right. Just to mark it for identification.

[Foundry testing report marked 'Plaintiff's Exhibit 29 for identification']." [Davis, direct.]

17. That the court erred in excluding the following question:

After the castings were made they were cleaned, chipped and a surface inspection made by looking them over, hammering and chipping them.

[fol. 247] "Q. What do you mean by hammered and chipped?

A. We usually use a big hammer for testing castings, which is common foundry practice.

Q. Was anything, according to your records, found defective in that casting?

Mr. Witte: I pray your Honor's judgment.

The Court: That I exclude and save your exception." [Davis, direct.]

18. That the court erred in admitting the following question:

"Q. Did the foundry guarantee the tensile strength and the endurance of the housings in this case?

Mr. Friedman: I don't see how that is material.

The Court: That I will allow and save your exception.

A. No, sir, we don't guarantee nothing." [Davis, cross.]

19. That the court erred in excluding the following question:

"Q. Assuming that a test bar of this kind was taken out of a casting that had been in use—if you assume that a casting had been under a strain, would that affect its tensile strength?

A. I don't think so.

Q. Would it affect—you don't think so. Suppose the machine had been stressed to the point of metal fatigue, would that affect the tensile strength of the metal?

A. Yes.

Mr. Witte: Wait a moment.
The Court: That I exclude.
Mr. Friedman: Your Honor will have in mind that Mr. Perkins testified that there had been a metal fatigue in the stanchion that broke.
The Court: He said that is what he thought was the reason for it. I exclude it and save your exception. Incidentally, I know nothing about the subject, but I suppose it might be the fact that part of the stanchion might be awfully tired and another part not. Certain parts of the body are more fatigued than others at times. I find it so sitting in court all day. It may be true of the stanchion." [Davis, redirect.]

20. That the court erred in excluding the following question:

[fol. 248] Q. Do you know what the cost is of a new stanchion, such as you saw on that Smith press?

Mr. Witte: I pray your Honor's judgment.

A. If you will give me a couple of minutes.
Q. Wait a minute. In 1925.

The Court: What is the question? The cost of it?
Mr. Friedman: Price of it, I think I said.
Mr. Witte: I pray your Honor's judgment. We were not buying stanchions. We were buying an entire machine.
Mr. Friedman: Yes, but your Honor has in mind this question: that one stanchion broke, and I suggest the price of replacing that stanchion is an element that is properly to be considered here.
The Court: That I exclude and save your exception.
Mr. Friedman: And I take it, in accordance with your Honor's suggestion the other day, in the way you exclude evidence, you do not require any offer of proof?
The Court: No, sir." [Kingsland, direct.]

21. That the court erred in excluding the following question with reference to Exhibit CC:

"Q. When you received that letter (Exhibit CC) could you tell what they were complaining about in your machine?

Mr. Witte: Wait a minute.
The Court: That I exclude.

Mr. Friedman: I offer to show your Honor that the leter was not such as to furnish him with any idea of what they were complaining about.

The Court: I will exclude it and save your exception." [Ohl, direct.]

22. That the court erred in excluding the following question with reference to the machine and dies:

"Q. And were they adapted to the work for which they were designed?

Mr. Witte: I pray your Honor's judgment?

The Court: That I exclude.

[fol. 249] Mr. Friedman: I will have an exception, your Honor?

The Court: Sure." [Ohl, direct.]

23. That the court erred in admitting into evidence Exhibit RRR.

24. That the court erred in admitting the testimony as to the tensile strength of specimens taken during trial by Smith from the area of the break in the broken stanchion of the machine in question showing a tensile strength for one specimen of 25,600 pounds and for the other of 26,800 pounds per square inch. [Mann, direct.]

25. That the court erred in admitting testimony as to the average strength of the stanchion based on the cross-sectional area and on the tests on test bars taken from that stanchion after and from the area of the break in that stanchion.

26. That the court erred, both parties having rested, in denying Ohl's motion that Smith:

"Be required to elect whether it will proceed under its defense in this action or under its cross action being tried herewith."

27. That the court erred, both parties having rested, in denying Ohl's motion that Smith:

"Be required to elect whether it will proceed with this action or rely upon its defense in the cross action being tried herewith."

28. That the court erred, both parties having rested, in denying Ohl's motion:

"That the court herein direct a verdict for the plaintiff, Ohl."

29. That the court erred, both parties having rested, in denying Ohl's motion:

"That the court herein direct a verdict for the defendant, Ohl."

30. That the court erred in refusing to rule upon the effect of the evidence under Smith's answer in Ohl's case—absence and failure of consideration—in refusing Ohl's requests:

[fol. 250] 2. The Smith complaints in these cases concern only the machine itself.

3. Smith received, has retained, and still has the machine which Ohl delivered in performance of the contract between them.

4. In the Ohl case there was on all the evidence adequate consideration for the notes declared on.

5. In the Ohl case there was on all the evidence no total failure of consideration.

6. In the Ohl case on all the evidence the only partial failure or failures of consideration claimed by Smith arise through the alleged breaches of warranty.

31. That the court erred in refusing Ohl's request No. 9-A, "The contract between the parties is governed by the Sales Act."

32. That the court erred in refusing to rule on the application to the pleadings and evidence of General Laws Chapter 106, Section 58 (1) (a) (b) and (2), by refusing Ohl's request:

7. Smith's defense in the Ohl case has the same legal effect as though that action were for a purchase price of the machine and the defense was by way of recoupment for breaches of warranty.

8. Smith may not at the same time defend in the Ohl case for a claimed failure of consideration and in the Smith case

keep the machine and maintain an action against Ohl for claimed breaches of warranty.

9. Smith having elected to sue Ohl in an independent action for alleged breaches of warranty, and having elected to retain the machine, waived his defense in the Ohl case and is limited to such rights as he can establish in the Smith case.

33. That the court erred in refusing to rule on the legal scope and limits of the written contract Exhibit A and the documents therein incorporated by reference in refusing Ohl's requests:

10. The contract between Ohl and Smith is fully contained in Ohl's letter to Smith of November 9 (Exhibit 13), the specifications there referred to (a part of Exhibit 14), [fol. 251] Smith's letter to Ohl of November 24, (Exhibit B), Ohl's letter to Smith of December 4, (Exhibit C) and its enclosure dated December 2 (Exhibit D) and the agreement of March 1 with its attached rider dated March 9 (Exhibit A).

11. The rider of Exhibit A is an express warranty.

12. The express warranty of Exhibit A incorporates by reference to "our specifications of said press" so much of the specification of Exhibit 14 as concern- the capacity of the press stated in those specifications.

34. That the court erred in refusing correctly to construe and explain to the jury the language of Exhibit A and the documents therein incorporated by reference and the legal effect thereof in refusing Ohl's requests:

13. Those specifications expressly refer to a "bending" capacity.

14. The express warranty in this case is limited to a warranty of bending capacity.

15. The express warranty in this case is limited to a warranty of bending capacity and does not include a setting capacity as well as a bending capacity.

70. The express warranty of the Ohl Company is in writing in plain unambiguous language, and its construction is a question of law for the court.

71. That there is no language used in the express warranty that has any peculiar or trade meaning.

72. That there is no evidence in the case to give to any language used in the warranty any meaning other than its ordinary everyday meaning.

73. The meaning of the express warranty is that the machine is not required to do anything more than to bend ⅜" soft steel on dies the female of which measures 3" across the corner.

74. To bend metal is different from setting it. The process of bending metal does not necessarily include the process of setting.

[fol. 252] 75. The common accepted definition of "to bend" is to bring into a curve or out of or aside from a straight line.

76. The common accepted definition of "to set" is to put into a fixed permanent or immovable condition, position or form.

35. That the court erred in refusing to instruct the jury as to the legal effect of Exhibit A and the documents therein incorporated by reference in application to the evidence by refusing Ohl's requests:

16. On all the evidence a machine of this type requires a greater capacity to bend and set soft steel on dies than merely to bend such soft steel on the same dies.

17. A claim of a warranty that the machine was to have a capacity to bend and set ⅜" soft steel (or any lesser thickness) on square dies the female of which measures 3" across the corners is inconsistent with the express language used in the express warranty which describes that capacity as for "one bend at a time", describes the machine as one "which will bend" the heavier gauge of material and which will bring out "multiple bends".

18. The fact that the express warranty is for a bending capacity negatives the existence of any implied warranty that the machine also would set a bend when made.

19. If the jury find that the machine had sufficient capacity to bend ⅜" soft steel one bend at a time on dies the

female of which measures 3″ across the corners then Smith may not recover for any deficiency in the capacity of the machine.

63. An express warranty negatives all other warranties or conditions inconsistent with it.

64. The express warranty given by Ohl to Smith as shown in Exhibit A does not contract that the machine will bend ⅜″ soft steel to any given angle.

68. Smith's claim is that the machine should have capacity (a) on dies the female of which is 3″ across the cor- [fol. 253] ners (b) using ⅜″ soft steel (c) to bend (d) and set the bend (e) to a 90 degree angle (f) at one operation.

69. The elements a, b and c in the foregoing request are within the express warranty but none of the elements d, e or f are within that express warranty, and even if the Ohl machine could not perform d, e and f, there is no liability on the Ohl Company for breach of any warranty on that score.

36. That the court erred in charging the jury: "There is also an implied warranty as it is called that the machine would do perfect work—that is simply all the law there is to it really—so the only question here is—was that machine a reasonable and proper machine and did it in fact bend this steel, this soft steel, in the way which the manufacturer Ohl agreed that it would bend that steel—but it is all a question of fact—there is a minor question of bending and the difference between bending and setting. I don't personally get the idea of what you want to set steel for, or bend it rather, without setting—I don't quite see what that amounts to but you are the arbiters of that and it is for you to say whether in making these risers and stringers that the iron must not only be bent but must be set. All that is within your province—the whole thing I say comes down to a question of fact. Would this machine bend the iron in a proper way to turn out merchantable stair treads and risers and stringers? Now it is up to you to say on this whole case—in the first place—did the machine do or would the machine have done if properly handled and operated the work in turning and bending those soft steel plates."

37. That the court erred as to Smith's claim that it was on the evidence entitled to a safety device on the machine in question by refusing Ohl's requests:

20. On all the evidence the machine delivered to and received by Smith was of the design shown in Exhibits 13 and 14 (Ohl to Smith November 9, 1925 and enclosures, Exhibits 13 and 14).

21. There is no evidence that the design of the machine [fol. 254] in question calls for any so-called safety device that was omitted in the machine when delivered.

22. The express warranty of Exhibit A does not require any so-called safety device.

23. The express warranty of Exhibit A "that the material and workmanship are of the best" does not include any warranty as to the design of the machine.

23a. The express warranty of Exhibit A that the machine has a capacity of $\frac{3}{8}$" soft steel as stated in the specifications does not include a warranty as to the design of the machine.

24. If the machine had the capacity called for by the contract it is immaterial whether or not it had any device to prevent breakage when operated beyond that capacity.

38. That the court erred in charging the jury: "Also there is a disputed question about whether a safety device of some kind was necessary, and whether this clutch amounted to a safety device in that it would slip if it was properly adjusted. These are questions of fact, gentlemen, on which you are the final judges."

39. That the court erred in refusing to rule as to the legal effect of Smith's specifications in refusing Ohl's requests:

25. Smith has specified that the press from the very beginning rendered unsatisfactory service in the particulars specified in specifications 3-A to E.

26. It is uncontroverted that the press was first operated by Smith on April 15, 1926.

27. Smith herein is charged with actual knowledge beginning on or about April 15, 1926 of the claimed defects in the

machine fairly within the scope of specifications 3-A to E inclusive.

62. The Smith Company is bound by and limited to matters set out in its specifications.

40. That the court erred in refusing to rule on the effect of General Laws Chapter 106, Section 38, calling for reasonable notice of claimed defects within a reasonable time, in its application to Smith's "Safety device claim" and the evidence material thereto in refusing Ohl's requests:

[fol. 255] 65. The lack of any safety device other than the 25-inch diameter friction clutch was a matter apparent to Smith at *at* the time the machine was delivered and assembled and before April 15, 1926.

66. No notice of complaint based on any lack of a safety other than such friction clutch prior to Exhibit 20 of November 22, 1926 is in evidence.

67. Smith may not recover for any damage due to any lack of any safety device other than the 25-inch diameter friction clutch.

41. That the court erred in refusing to rule on the effect of General Laws Chapter 106, Section 38, calling for reasonable notice without reasonable time of defects claimed by a buyer in its application to Smith's specifications and the evidence by refusing Ohl's requests:

28. It is uncontroverted that the first notice to Ohl of any claim of any breach of waranty was that specified in Specification 9-A, letter of June 25, 1926. [Exhibit CC.]

29. On all the evidence Smith accepted the machine as that word is used in the Sales Act.

30. The law provides that if Smith having accepted the machine failed to give Ohl notice of the breach of any promise or warranty within a reasonable time after he knew or ought to have known of such breach Ohl shall not be liable therefor.

33. A notice given on June 25 of breaches of warranty fairly within the scope of specifications 3-A to E inclusive is as a matter of law not given within a reasonable time.

34. Smith may not recover for any breaches of warranty fairly within the scope of specifications 3-A to E inclusive.

39. The next notice is that of August 23 which specifies a claim of failure to bend without material deflection and a defect in the clutch. [Exhibit II, specification 9.]

40. On all the evidence the clutch defect claimed in that notice refers to a defect in the flywheel assembly, itself referred to in specification 3-B.

[fol. 256] 41. Smith is charged with knowledge of that clutch trouble from the very beginning or from on or about April 15, 1926. [Specification 3.]

42. The August 23 notice as it concerns a claim of a clutch defect was as a matter of law not given within a reasonable time as required by statute.

43. The failure to bend material without a material deflection claimed in the August 23 notice is fairly within the scope of specification 3-D.

44. Smith is charged with knowledge of the defect claimed in that notice from the very beginning or from on or about April 15. [Specification 3.]

45. That notice as a matter of law was not given within a reasonable time as required by statute.

46. The next notice claimed is that of August 25. [Exhibi-JJ, specification 7.] That notice refers to various parts in the flywheel assembly more specifically described in the notice.

47. Smith is charged with knowledge of defective operation of that flywheel assembly from the very beginning, or April 15, 1926. [Specification 3.] That notice as a matter of law was not given in time to satisfy the requirements of the statute as to notice so far as it concerns anything concerning the flywheel assembly.

48. That notice claims the 16-inch bushing was a poor loose fit and turned around. On Smith's own evidence it is uncontroverted that that bushing turned around and the looseness of fit was claimed to have been observed by Smith on April 15, 1926.

49. The August 25 notice as it concerns the 16-inch bushing was not given in time to satisfy the statute as to notice.

52. Specification 11-A is fairly within the scope of specification 3-B and with that claimed defect Smith from the very beginning is charged with knowledge.

53. Specification 11-A was not a notice given within a reasonable time to satisfy the statute as to notice.

[fol. 257] 54. Specification 11-B is fairly within the scope of specification 3-D, and with that claimed defect Smith from the very beginning is charged with knowledge.

55. Specification 11-B was not a notice given within a reasonable time to satisfy the statute as to notice.

58. Exhibit 20, the Swett-Townsend report, is not a notice given so as to satisfy the requirements of the statute as to notice.

59. That bowing of the plate after bending if due to the machine was a defect fairly within the scope of specification 3-D with knowledge of which Smith is charged from the very beginning or on or about April 15, 1926.

60. As to that bowing Exhibit 20 is not a notice given in time to satisfy the requirements of the statute.

42. That the court erred in charging the jury: "There is a question of law, evidence as to whether a notice of defect was given within a reasonable time, and on that I rule that it was so given and an exception will be taken to that ruling."

43. That the court erred in refusing to grant Ohl's 32d request: "The decisions of the Supreme Judicial Court of the Commonwealth of Massachusetts in construing the Sales Act are binding upon the court."

44. That the court erred in refusing to rule on the adequacy in law and on the evidence of notices of defects to Ohl claimed by Smith in refusing Ohl's requests:

35. The notice which the Sales Act calls for must fairly advise the seller of the alleged defects.

36. The June 25 notice (Exhibit CC) on the uncontroverted evidence of Smith erroneously refers to an alleged

defect that did not then exist and that exhibit did not refer to the defect which Smith claims then existed.

37. The June 25 notice even though seasonably given was insufficient to satisfy the requirements of the Sales Act as to notice.

38. It is uncontroverted that the next notice claimed was [fol. 258] that of August 13, 1926 [Exhibit EE, specification 9]. That notice does not fairly advise Ohl of any alleged defect and, therefore, does not satisfy the requirements of the statute as to notice.

50. The next notice claimed is that of September 1 [specification 9], which is specified to have been oral [specification 10] and to have included the claimed defects defined in specifications 11-A to E.

51. Specifications 11-C, D and E did not fairly advise Ohl of any claimed defects and are not sufficient to satisfy the requirements of the statute as to notice.

56. The next notice claimed was that of September 3 [Exhibit MM, specification 9].

57. That notice does not fairly advise Ohl of any claimed defect and is not sufficient to satisfy the statute as to notice.

45. That the court erred in refusing Ohl's 61st request: "Ohl is not responsible for a damage to the machine resulting from the defective sub-support criticized in Exhibit 20."

46. That the court erred in charging the jury that it is for the jury: "To say whether it [the machine] broke under a fair trial or whether at the time that it broke it had an improper load put on it and the machine was operated improperly."

47. That the court erred in charging the jury with reference to Ohl's witness Dailey: "I really think I ought to warn you not to be too prejudiced against the Ohl Company for their mistake in sending that liar to the Smith shop to look at that machine because it is natural for you and me to love the truth and think very badly of Mr. Dailey."

48. That the court erred in charging the jury on Smith's damages in charging: "If on the other hand you find the machine would not do it, you must make up your minds what that machine is worth in its present condition or what it would have been worth rather at the time before it was broken, what a machine like that machine which wouldn't do quite what it was agreed to do—what that would have been worth at the time before it broke—there [fols. 259 & 260] is some evidence as to the present value of that machine and you may find on that what it is * * * you will find what the machine is worth."

49. That the court erred in charging the jury with reference to Smith's claim for repairs as damages in ruling that the jury: "May also find for the plaintiff [Smith] for the sum of money which they spent in fixing up the flywheel in one case and also the repairing of the machine. * * * You may add to it the amount which they spend for repairs in the neighborhood of $2,500."

50. That the court erred in not adequately instructing the jury on the issues raised by the pleadings, specifications, evidence and requests for rulings.

51. That the court erred in failing in its charge to present to the jury issues of the case.

52. That the court erred in failing to give to the jury instructions to guide them on the issues of law involved in the case and raised by the evidence and Ohl's requests for instructions.

53. That the court erred in failing to instruct the jury as to its verdict in the Ohl v. Smith case in the event that it found that the machine was not what the contract called for.

54. That the court erred in each case in denying Ohl's motion for a new trial.

55. That the court erred in not instructing the jury that no notes or testimony or measurements of exhibits were to be taken by the jurors except under instructions of the court in open court and in overruling the plaintiff's motion for a new trial based on this.

George A. Ohl & Co., by Friedman, Atherton, King & Turner, Its Attorneys.

Bond on appeal for $9,000, approved and filed November 25, 1930, omitted in printing.

[fol. 261] IN UNITED STATES DISTRICT COURT

DEFENDANT'S PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed November 25, 1930

1. Writ and return.
2. Declaration, omitting Exhibit A and substituting therefor the following Exhibit A, referred to in the declaration, is here omitted as it is set forth in full in the substitute bill of exceptions herein.
3. Defendant's answer.
4. Defendant's motion for specifications. Omit plaintiff's specifications as amended and substitute therefor: "Plaintiff's specifications as amended are omitted as they are set forth in full in the substitute bill of exceptions."
5. Jury empanelled.
6. Defendant's motion for election and order.
7. Defendant's motion for directed verdict and order.
8. Jury verdict.
9. Defendant's motion for new trial.
10. Hearing on motion for new trial and order.
11. Defendant's bill of exceptions with reference to motion for new trial, omitting therefrom the copy of the motion for a new trial attached.
12. Defendant's substitute bill of exceptions and amendment thereto.
13. Defendant's petition for appeal.
14. Defendant's assignment of errors.
15. Defendant's bond on appeal.

Lee M. Friedman, Friedman, Atherton, King & Turner, Its Attorneys.

November 25, 1930.

Service of the above præcipe is hereby acknowledged and the right to file a cross præcipe is waived.

Martin Witte, Attorneys for A. L. Smith Iron Works, Plaintiff.

[fol. 262] Citation, in usual form, showing service on Martin Witte, omitted in printing.

[fol. 263] Clerk's certificate to foregoing transcript omitted in printing.

MEMORANDUM RE ORDER ENLARGING TIME

[MEMORANDUM.—An order for enlargement of time for docketing cases to, and including, January 26, 1931, is here omitted.—A. I. Charron, Clerk.]

[fol. 264] Minute entry of argument and submission, October 22 and 23, 1931, omitted in printing.

[fol. 265] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1931

No. 2537

GEORGE A. OHL & Co., Plaintiff, Appellant,

v.

THE A. L. SMITH IRON WORKS, Defendant, Appellee

No. 2538

Same

v.

Same

Appeals from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson, and Morris, JJ.

OPINION OF THE COURT—Filed March 22, 1932

MORRIS, J.:

These suits are counter actions involving a contract for the manufacture and sale of a heavy power press or brake for the bending and shaping of metal.

George A. Ohl & Co., plaintiff in the first action and defendant in the second action, is a corporation organized under the laws of the State of New Jersey, with a place of business in Newark in said State. It is engaged in the manufacture of different kinds of machines for stamping, rolling, bending and cutting sheet metal products.

The A. L. Smith Iron Works is a Massachusetts corporation having a place of business in Chelsea in said [fol. 266] Commonwealth. It is engaged in structural steel and ornamental iron business. One of its principal lines is the fabrication and installation of metal stair stringers, treads and rails used in the construction of stairways in large buildings.

The subject of litigation between the parties is a machine for fabricating such stair material.

From the pleadings and arguments of counsel, it appears that on November 24, 1925, the Smith Company wrote to the Ohl Company ordering a press to be manufactured according to specifications previously furnished by the Ohl Company. The purchase price of the press with certain accessories and dies was $12,009.68. The terms of payment were $1,000 cash with order, $1,000 when the machine was ready for delivery, $250 cash with the order for dies, and the balance of $9,759.68 by 18 notes, the first note for $545.68 and 17 notes for $542 each, the first note payable thirty days from the date thereof and the remaining notes at intervals of one month each or sooner.

This contract was put in writing and bears date of March 1, 1926. On March 9, 1926, the following rider was physically attached to the contract:

"Newark, N. J., March 9, 1926.

We hereby guarantee that the 12′ 6″—103,000 Power Press has a capacity stated in our specifications of said press, namely ⅜″ steel on square Dies the female of which measures 3″ across the corners, and that the material and workmanship are of the best.

Geo. A. Ohl & Co. F. J. Wepler, Secretary."

From the pleadings in the case, it appears that the machine was completed, shipped and installed in the Smith Company's factory in March and first operated April 15,

1926; that it was unsatisfactory in several particulars and the Smith Company refused to pay the last twelve notes aggregating $6,404 with interest and protest fees.

The first action, No. 2537, was brought by the Ohl Company against the Smith Company to recover on the above mentioned notes.

[fol. 267] In its answer the Smith Company after pleading the general issue set up want of consideration and failure of consideration.

Upon being called upon for specifications the Smith Company set out in detail the particulars in which it claimed the machine failed to meet the requirements of the guarantee in the rider attached to the contract.

The second action, No. 2538, brought by the Smith Company against the Ohl Company set out the guaranty and breach of the same.

The answer of the Ohl Company admitted the contract and its terms; denied all other allegations, and set up an examination and acceptance by the Smith Company in satisfaction of all warranties.

The pleadings in the case appear to be in form to raise the issues between the parties. The two cases were tried together before a jury. In 2537, Ohl Co. v. Smith Company, there was a verdict for the defendant. In 2538, Smith Co. v. Ohl Co., there was a verdict for the plaintiff for $7,500.

Judgments were entered in the District Court upon these verdicts.

The Ohl Company alleged errors and filed in the District Court a document headed "Bill of Exceptions." The document does not bear the signature of the District Judge. The so-called bill of exceptions is signed by the attorneys and is initialed by the District Judge as follows:

> "By Friedman, Atherton, King & Turner, Its Attorneys.
>
> Assented to.
> Martin Witte, Robert Gallagher, Attorneys for A. L. Smith Iron Works.
>
> Allowed August 20, 1930.
> J. A. L., D. J."

Counsel for the Smith Company take the position that there is a fatal defect in the record, in that the bill of ex-

ceptions filed by the Ohl Company is not properly authenticated, and for this reason they move that the bill of excep- [fol. 268] tions be stricken from the record. They further take the position that there is no certificate by the judge to the effect that the bill of exceptions contains all the material evidence in the case.

Congress by Section 4 of the Act of June 1, 1872, c. 225, now Sec. 953 of the Revised Statutes (28 U. S. C. A. 776), enacted as follows: "A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat on trial of the cause, without any seal of court or judge being annexed thereto."

The Supreme Court of the United States in construing this statute has held that initials of the trial judge do not constitute an authentication sufficient to enable an appellate court to consider exceptions on review. Origet v. United States, 125 U. S. 240, 244. In this case a paper headed "Bill of Exceptions" not bearing the signature of the judge, but containing at its foot these words, "Allowed and ordered on file, November 22, '83, A. B." was before the court for consideration. Mr. Justice Blatchford delivering the opinion of the court says:

"This provision merely dispensed with the seal. The necessity for the signature still remains. We cannot regard the initials, 'A. B.' as the signature of the judge, or as sufficient authentication of the bill of exceptions, or as sufficient evidence of its allowance by the judge or the court. Therefore, the question purporting to be raised by the paper cannot be considered."

In the case of Kinney v. United States Fidelity Co., 222 U. S. 283, Chief Justice White, commenting on a like situation, says: "The paper in the record styled 'Exceptions to the charge to jury,' initialed 'J. B. McP., trial judge' and signed by the plaintiff is not a bill of exceptions."

In the case of Maloney v. Adsit, 175 U. S. 281, it was held that allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial; and section 953 of the Revised Statutes is intended to provide and does provide that no bill of exceptions

[fol. 269] can be deemed sufficiently authenticated unless signed by the judge who sat at the trial or by the presiding judge if more than one sat.

This case was decided December 4, 1899. Following its decision Congress on June 5, 1900, amended Rev. Stat. 953 by adding a provision allowing, in case of death of the presiding justice, another judge to pass upon the bill of exceptions if the evidence in such case has been taken in stenographic notes, or if the judge is satisfied by any other means that he can allow a true bill of exceptions.

In the case of Krauss Bros. Co. v. Mellon, 276 U. S. 386, decided by the Supreme Court April 9, 1928, Chief Justice Taft after quoting in part Sec. 953 of the Revised Statute says: "Since the passage of that Act it is not necessary to seal a bill of exceptions. Herbert v. Butler, 97 U. S. 319, 320; Maloney v. Adsit, 175 U. S. 281, 285, but the signature is still necessary." Citing the Origet and Kinney cases above mentioned.

Counsel for the Ohl Company takes the position that because the so-called "Bill of Exceptions" was assented to by counsel for the A. L. Smith Iron Works, therefore we should treat it as a bill of exceptions even though not signed by the District Judge.

Quoting from the opinion of the Circuit Court of Appeals in the case of Krauss Bros. v. Mellon, supra, Chief Justice Taft says:

"'As applicable to the deficiency of the record here shown the well settled rule is this. Depositions, exhibits or certificates not contained in the bill of exceptions cannot be considered even though found in the printed transcript. The parties by their affidavits or agreements cannot cause that to become a bill of exceptions which is not such in a legal sense.'"

The action at bar was tried before a jury and a verdict rendered May 7, 1929. The so-called bill of exceptions was initialed by the judge August 20, 1930. The term of court during which the case was tried and the one during which the bill of exceptions so called was presented for the judge's signature has long since terminated.

In the case of Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va., 153 Fed. 723, it was held that a bill of

[fol. 270] exceptions cannot be considered by an appellate court unless it was duly presented to and allowed by the trial judge during the term at which the trial was had or within the time as extended by an order made during such term. Pritchard, Circuit Judge, says:

"While it is not the policy of the court to dismiss writs of error in cases on appeal on account of slight technicalities, at the same time, the rules of this court, as well as the rules of the Circuit Court, are plain and easily understood. In this instance the provision of the statute relating to the question at issue is mandatory and must be enforced. It is encumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions." Citing Michigan Insurance Bank v. Eldred, 143 U. S. 298.

See Michigan Ins. Bank v. Eldred, 143 U. S. 293; Knight v. Illinois Central R. R. Co., 180 Fed. 368. Realty Acceptance Corp. v. Montgomery, decided by the Supreme Court, February 15, 1932.

In the Origet and Kinney cases above cited the Supreme Court was interpreting an Act of Congress and in so doing it held that a bill of exceptions was not sufficiently authenticated unless signed by the judge of the court and that the initials of the judge do not satisfy the provisions of the statute. We are bound by this ruling of the Supreme Court. It is too late to send the case back for amendment as the term at which the judgments were entered has expired and the District Court has lost jurisdiction of the case. Exporters v. Butterworth-Judson Co., 258 U. S. 365. United States v. Mayer, 235 U. S. 55, 67. Delaware L. & W. R. R. v. Rellstab, 276 U. S. 1. We see no escape from an order affirming the judgments of the District Court.

In No. 2537, the judgment of the District Court is affirmed with costs; and in No. 2538, the judgment of the District Court is affirmed with interest and costs.

[fols. 271 & 272] In United States Circuit Court of Appeals

Judgment—March 22, 1932

This cause came on to be heard October 22 and 23, 1931, upon the transcript of record of the District Court of the

United States for the District of Massachusetts, and was argued by counsel:

Upon consideration whereof, It is now, to wit, March 22, 1932, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed with interest and costs.

By the Court.

Arthur I. Charron, Clerk.

[fols. 273-315] Petition for rehearing, covering 43 pages, filed April 20, 1932, omitted from this print. It was denied, and nothing more by order of May 6, 1932.

[fol. 316] Thereafter, to wit, on May 6, 1932, the following Order of Court was entered in each case:

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING REHEARING—May 6, 1932

No judge who concurred in the judgment entered March 22, 1932, desiring a rehearing, it is ordered that the petition for rehearing filed April 20, 1932, be, and the same hereby is, denied.

By the Court.

Arthur I. Charron, Clerk.

MEMORANDUM RE STAY OF MANDATES

Thereafter, to wit, on May 17, 1932, mandate in each case was stayed until further order of court.

[fol. 317] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 318] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1932

No. 228

ORDER ALLOWING CERTIORARI—Filed October 17, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 319] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1932.

No. 229

ORDER ALLOWING CERTIORARI.—Filed October 17, 1932.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,925, 36,926. U. S. Circuit Court of Appeals, First Circuit. Term No. 228. George A. Ohl & Company, petitioner, vs. The A. L. Smith Iron Works. Term No. 229. George A. Ohl & Company, petitioner, vs. The A. L. Smith Iron Works. Petition for writs of certiorari and exhibit thereto. Filed July 15, 1932. File No. 36,925, 36,926.

FILE COPY

Office Supreme Court, U. S.
FILED
JUL 15 1932
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

October Term, 1932.

No. 228

George A. Ohl & Company,
Petitioner,

v.

The A. L. Smith Iron Works,
Respondent.

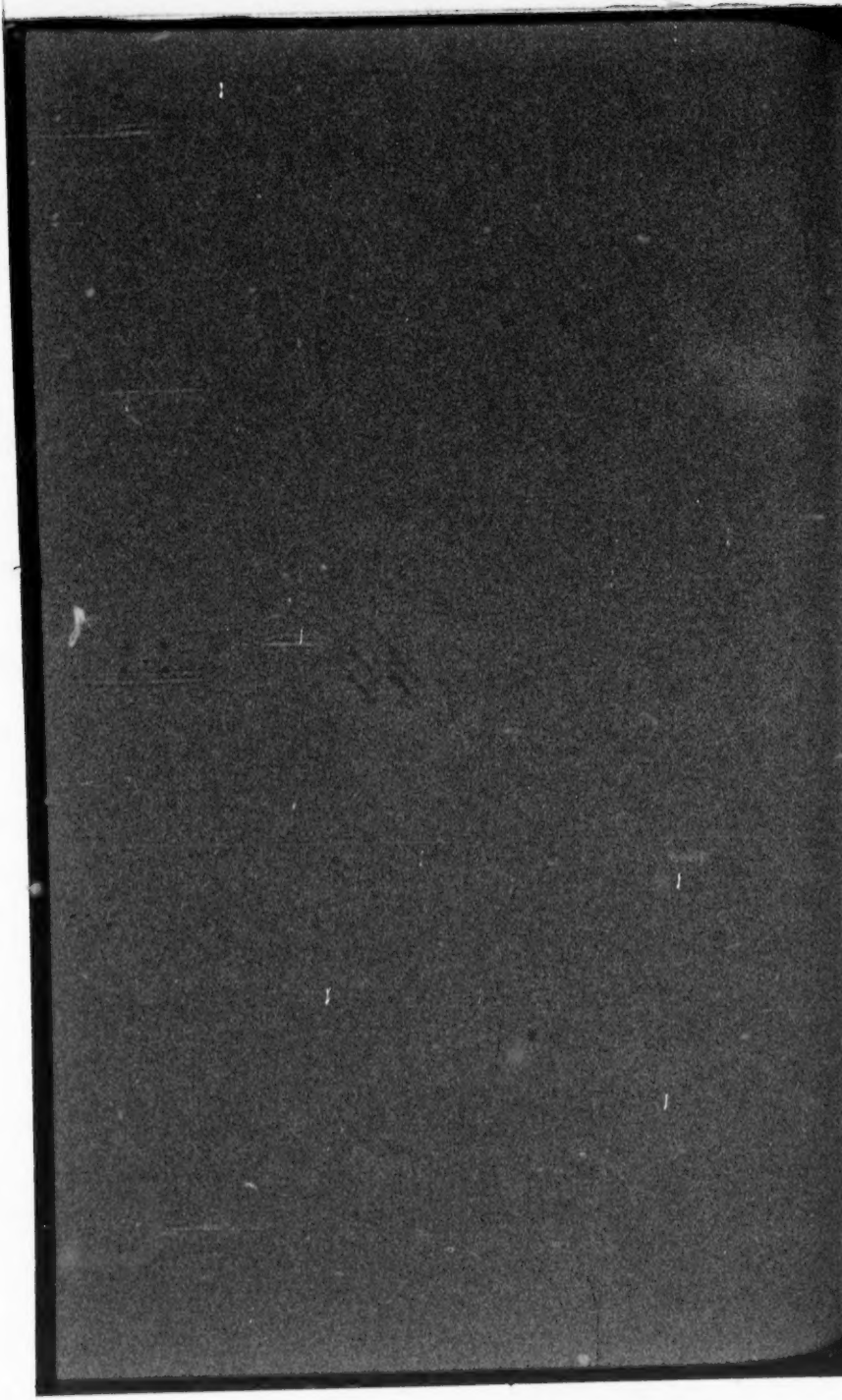
No. 229

Same v. Same.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit and Brief in Support Thereof.

FRIEDMAN, ATHERTON, KING & TURNER,
LEE M. FRIEDMAN,
LOUIS B. KING,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.



INDEX.

	Page
Petition for writs of certiorari	1
Certificate of James S. Allen, clerk	8
Brief in support of petition for writs of certiorari	13
A. Statement of case, questions raised and errors assigned	13
B. There was merit in the bills of exceptions warranting judicial review	14
C. Argument	16
I. The present decision is in conflict with the practice established by another Federal Circuit Court of Appeals, and introduces uncertainty into Federal procedure and practice	16
II. Liberalized Federal practice does away with such technicalities of procedure as were here applied	18
III. The mistake was amendable	22
IV. "Judgment term"	28
V. Appeal does not prevent relief	32
VI. A reactionary and unworthy decision	32

AUTHORITIES CITED IN BRIEF.

Barber Asphalt Co. v. Standard Co., 275 U.S. 372	14, 21, 32, 33
Bedford v. J. Henry Miller, Inc., 212 Fed. 368	23
Bills of Exceptions, Re, 37 F. (2d) 849	30, 31
Blitz v. Brown, 7 Wall. 693	26
Brown v. United States, 196 Fed. 351	25
Bryan v. Ker, 222 U.S. 107	24
Chateaugay Ore & Iron Co., Petitioner, 128 U.S. 544	30
Clarksburg Trust Co. v. Commercial Casualty Ins. Co., 40 F. (2d) 626	21
Cotter v. Alabama, G. & S. R. Co., 61 Fed. 747	24
Dalton v. Gunnison, 165 Fed. 873	30
Davis v. Patrick, 122 U.S. 138	30
Dredge v. Forsyth, 2 Black, 563	29
Exporters v. Butterworth-Judson Co., 258 U.S. 365	29, 31
Fairbanks v. Beard, 247 Mass. 8	21
Federal Life Insurance Co., Re, 248 Fed. 908	31
Franklin County v. Furry, 144 Fed. 663	31
Hume v. Bowie, 148 U.S. 245	29
Hunnicutt v. Peyton, 102 U.S. 333	30
Idaho & Oregon Land Co. v. Bradbury, 132 U.S. 512	26

Page

Jones v. Grover & Baker Sewing Machine Co., 131 U.S. Appx. cl. 29
Koewing v. Wilder, 126 Fed. 472 31
Krauss Brothers Lumber Co. v. Mellon, 276 U.S. 386 20
McDonald v. Nebraska, 101 Fed. 171 19, 24
Mark v. Stuart Howland Co., 226 Mass. 35 15
Matheson's Adm'rs v. Grant's Adm'r, 2 How. 263 23
Michigan Ins. Bank v. Eldred, 143 U.S. 293 25, 27, 29, 30
Miller v. Texas, 153 U.S. 535 24
Muller v. Ehlers, 91 U.S. 249 29
Mussina v. Cavazos, 6 Wall. 355 25
Norton v. Larney, 26 U.S. 511 23, 24, 32
Origet v. United States, 125 U.S. 240 25, 26
Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., 151 Fed. 466 30
Plymouth Cordage Co., In re, 135 Fed. 1000 25
Pomeroy's Lessee v. Bank of Indiana, 1 Wall. 592 24
Roberts v. Bennett, 135 Fed. 748 30
Scaife v. Western North Carolina Land Co., 87 Fed. 308 31
Schmid v. Standard Steel Car Co., 202 Fed. 1023 31
Southwest Metals Co. v. Gomez, 4 F. (2d) 215 31
Steen v. First National Bank, 298 Fed. 36 18
Taylor v. United States, 52 Sup. Ct. Rep. 466 30
Taylor Co. v. Anderson, 275 U.S. 431 23
Texas & Pacific Ry. Co. v. Kirk, 111 U.S. 486 24
United States v. Breitling, 20 How. 252 29
United States v. Turner, 50 Fed. 734 24
United States (Ex Rel. Kinney) v. U.S. Fidelity Co., 222 U.S. 283 28
Waldron v. Waldron, 156 U.S. 361 30
Walton v. United States, 9 Wheat. 651 29
Western Dredging & Imp. Co. v. Heldmaier, 116 Fed. 179 29, 31
Wight, In re, 134 U.S. 136 25

Act March 3, 1915, c. 90 19
Sales Act of Massachusetts, General Laws, c. 106, sec. 58 (1 a, b (2)) 15
St. Feb. 26, 1919, c. 48 19
U.S. Code, tit. 28, sec. 391 14, 19
U.S. Code, tit. 28, sec. 397 18
U.S. Code, tit. 28, sec. 398 18
U.S. Code, tit. 28, sec. 399 19
U.S. Code, tit. 28, sec. 777 14, 22

Supreme Court of the United States.

OCTOBER TERM, 1932.

No.

GEORGE A. OHL & COMPANY, PETITIONER,

v.

THE A. L. SMITH IRON WORKS, RESPONDENT.

No.

SAME *v.* SAME.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, George A. Ohl & Company, respectfully presents to this Court this its petition in each of the above cases for a writ of certiorari in each case addressed to the United States Circuit Court of Appeals for the First Circuit, commanding such Court and the clerk thereof to certify to this Court the record and proceedings of these cases in said Court, in each whereof your petitioner, a corporation of the State of New Jersey, was appellant and your respondent, The A. L. Smith Iron Works, a corporation of the Commonwealth of Massachusetts, was appellee, together with the opinion therein of said Circuit Court of Appeals for the review and determination of said causes by this Court.

These are two cross-actions tried together (R. 4), included in one record on appeal (R. I to III),* and decided by said Circuit Court in one opinion (R. 264).

The original controversy involved breach of a contract of conditional sale of a power press and accessories (R. 11, Ex. A) sold to the respondent who, after it had made payments aggregating $4963 (R. 215), claimed a breach of warranty (R. 32, Ex. EE). At the time of the trial (April and May, 1929, R. 4), three years after the sale (March, 1926, R. 11, Ex. A; R. 8, Specif. 1), the machine was still in use at the respondent's factory (R. 82, line 10). The jury reached the absurd verdicts that, although the respondent had accepted and had used the machine for years, there was a breach of warranty, and that in the petitioner's suit there could be no recovery of the purchase price balance (R. 5), and in the respondent's suit that the respondent should get back the $4963 he had already paid, plus $2500 damages (R. 234); so the verdicts resulted in the respondent retaining the petitioner's property without paying for it, and being awarded damages because the machine was not worth the contract price.

A very careful and exhaustive bill of exceptions† was prepared and later redrawn as a substitute bill, and filed in court with the assent of the defendant endorsed thereon for allowance, and seasonably presented to the trial judge (Honorable James A. Lowell). The trial judge, in counsels' presence, examined the bills and orally allowed them. Later the same day, not in counsels' presence (R. 290, 307, 312), he endorsed in writing at the end of each bill the following: "Allowed August 20, 1930 J. A. L.

D.J." (R. 219, 221, 236, 237).

*The printed record (R. I to 263) omits certain exhibits in evidence, largely photographs, blue-prints and diagrams, which by stipulation were submitted direct from the District Court to the Circuit Court of Appeals (R. 11, 219, 237) in the form of one bound volume of approved copies. That volume is submitted herein by the clerk of the Circuit Court of Appeals for the First Circuit.

†There were four bills of exceptions assented to and seasonably allowed in each case, one to the trial merits, and one to refusals of a new trial (R. 219, 221, 236, 237). As each involved and was disposed of on the same issue, we generally refer to them in the singular.

The Circuit Court of Appeals for the First Circuit felt bound by some precedents of this Court to hold that the district judge had not sufficiently authenticated his allowance of the bills by this endorsement, and because of this lack of a sufficient signature by the judge there was no bill of exceptions in the Court of Appeals. So the judgments below were affirmed (R. 269).

The present petition for certiorari squarely raises the issue, perhaps for the first time, to what extent and how far the amendment to statute U.S. Code, tit. 28, sec. 391, passed in 1919 (St. February 26, 1919, c. 48), has done away with such technicalities as are here raised on the basis of old precedents. This statute and the spirit of the latest decisions of this Court, we submit, leave our Federal Courts not only free to disregard such trivialities, but compel them to overlook technicalities which in the past stubbed the judicial toe over the dotting of an "i" or the crossing of a "t". The order of the day now is that parties shall not be deprived of a chance to have rights finally adjudicated on their merits in a court of justice because a judge adopts as his signature an informal rather than a formal form.

The question here presented is whether the later decisions of this Court, interpreting the statutes and rules of Federal procedure, have not introduced this new and more liberal viewpoint and superseded earlier decisions of this Court.

Our brief will show that the trial judge and the clerk of Court followed a long-established practice of this District Court and Circuit Court of Appeals for the First Circuit in treating as sufficiently allowed for appellate purposes a bill of exceptions signed by the trial judge with his initials. Over a long period of time bills of exceptions signed by the trial judge with initials only had been accepted as the record on review and appeal to the Circuit Court of the United States for the First Circuit. Prior to this decision that practice in the District Court and the Circuit Court of Appeals had in no way been criticized. Without comment this practice was considered by the judges, clerks and bar in said

District Court and in said Circuit Court of Appeals as proper practice. We invite attention to the certificate of the clerk of the District Court submitted herewith (a copy appears on page 8 hereof) and to the request of the District Judge Lowell (R. 312).*

On March 22, 1932, the Court of Appeals, without consideration of the merits, rendered its judgments affirming the judgments of the District Court based solely on this technical defect (R. 269, 270).

The Court failed to consider the bearing on the error in question of the statute of "Harmless Error" (U.S. Code, tit. 28, art. 391), or of the statute of "Amendments" (U.S. Code, tit. 28, art. 777), and the rule announced and the course followed by this Court in the same and like situations in *Michigan Ins. Bank* v. *Eldred*, 143 U.S. 293, and *United States* (*Ex Rel. Kinney*) v. *U.S. Fidelity Co.*, 222 U.S. 283. (This we discuss in our brief, pp. 18-28.)

---

*This point would probably not have arisen if respondent's counsel, after having assented to the bills of exceptions, shortly before oral argument in its brief for the first time had not questioned the sufficiency of Judge Lowell's signatures to these bills. Neither then nor later did they file or present any formal motion to that issue.

The claimed defect coming to your petitioner's actual knowledge for the first time just before argument in the Circuit Court of Appeals, your petitioner sought and believed it had in the limited time available found an answer to that issue under the statutes and authorities which it cited in a supplemental brief filed at the opening of its oral argument. Your petitioner first brought the question to the actual attention of the Circuit Court at the opening of its oral argument, defined the issue, stated that counsel thought his supplemental brief cited authorities enabling the Circuit Court to dispose of the issue in these cases, but asked that if the question became of moment he might further be heard and take such proceedings as might lie to cure any error.

The presiding judge, to counsel's statement that the issue turned on the fact that Judge Lowell had signed the bills of exceptions with his initials only, asked, in substance, "What difference does that make?" to which counsel replied, in substance:

> "There is an old case in 125 U. S. where the Supreme Court said it did make a difference and while I feel my supplemental brief points out authorities which in this case enables this Court to deal with these bills on their merits I would like in case the Court does not agree with my ideas permission to be heard and to file such proceedings as may be necessary to cure the error."

The presiding judge replied in substance:

> "All right, proceed."

Oral argument was thereafter confined to the merits, and none to defective authentication (R. 273, 307).

In that supplemental brief your petitioner called to the Court's attention the facts that each of the bills was assented to and actually allowed and

Instead it erroneously ruled that the amendment necessary to cure the imperfect authentication was one of substance, which could not be had after the term at which the judgments were entered had expired. On that ruling, and not as a matter of discretion, it denied opportunity for the necessary amendment and affirmed the District Court's judgments.

A petition for rehearing was filed on April 20, 1932, and, without opportunity for argument and without opinion, denied on May 6, 1932 (R. 313).

The opinion of the Circuit Court herein presented for review is reported in 57 F. (2d) 44.

This petition is presented under the provisions of the U.S. Code, tit. 28, sec. 347.

The reasons relied on by your petitioner for issuance of said writs, and upon which your petitioner believes the writs ought to be issued, are as follows:

1. There is involved here the important issue of whether the Federal practice shall go forward under a proper interpretation of recent Federal statutes and decisions to free itself from still persisting clogs of technicalities which prevent decisions on the merits because of trivialities which hang on ancient precedents.

---

cited, among other authorities, the statute pertaining to record on appeal (U.S. Code, tit. 28, sec. 865), the statute of amendments (U.S. Code, tit. 28, sec. 777), the practice of this Court as to amendments defined in *Idaho & Oregon Land Co.* v. *Bradbury*, 132 U.S. 509, 513, and in *Norton* v. *Larney*, 266 U.S. 511, 516, and as followed by said Circuit Court of Appeals in *Koch* v. *Sidney Blumenthal & Co.*, 3 F. (2d) 395. Attention there was called to the policy of Federal Courts in like matters illustrated in *State of Kansas* v. *Meriwether*, 171 F. 39 (C.C.A. 8), *Nashua & Lowell R. Co.* v. *Boston & Lowell R. Co.*, 61 F. 237 (C.C.A. 1), *Cunningham* v. *German Insurance Co.*, 103 F. 932 (C.C.A. 6), *Railroad Co.* v. *Schutte*, 100 U.S. 644, and *Bedford* v. *Henry Miller, Inc.*, 212 F. 368 (C.C.A. 4). Attention was also called to the power of amendment illustrated in *Wight, Petitioner*, 134 U.S. 136, 143, and *Gagnon* v. *United States*, 193 U.S. 451, 456, and to the duty of a trial judge to sign a proper bill of exceptions, even after judgment term, illustrated in *Re Federal Life Ins. Co.*, 248 F. 908 (C.C.A. 7), and *Schmidt* v. *Standard Steel Car Co.*, 202 F. 1023 (C.C.A. 2). On these facts, these and other like authorities (and not merely on the fact of an assented to bill of exceptions as the Circuit Court in its opinion erroneously states, R. 268) your petitioner before the Circuit Court took the position that that Court should treat the error as harmless and give these bills their intended legal effect by treating them as though the imperfect authentication had been perfected.

2. The decision introduced uncertainty in Federal practice in that it is in conflict with a long-standing decision from a Circuit Court of Appeals of equal rank.

3. There is also involved the application and interpretation of the liberalizing recent Federal statutes which were meant to do away with miscarriages of justice, so that cases may not be disposed of for technical defects in practice or want of form alone.

4. The decision of this Court on matters herein involved is necessary that the interpretation of the statutes and the rules of Federal practice may be kept uniform throughout the various circuits.

5. An important Federal statute has been disregarded or misinterpreted by the Circuit Court of Appeals for the First Circuit, which raises a question of general application in Federal practice and procedure and which has not been, but should be, settled by this Court.

6. Said Circuit Court of Appeals has decided a question of Federal law of general application so as to be in conflict with applicable decisions of this Court and procedure in Federal practice.

7. Said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Wherefore your petitioner prays that in each said case a writ of certiorari herein issue.

GEORGE A. OHL & COMPANY,
By LEE M. FRIEDMAN,
LOUIS B. KING,
Its Counsel.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. BOSTON, July 5, 1932.

Louis B. King, first being duly sworn, deposes and says: That he is of counsel for the petitioner, George A. Ohl & Company; that he has read the foregoing annexed petition, and knows well the contents thereof; that he also carefully had read and studied the transcript of the record which accompanies said petition, being the transcript of the record of the case at bar; that the matters in said petition contained are, in the judgment of each affiant, duly supported in and by said transcript of record and the certificate of the clerk of the District Court of the United States for the District of Massachusetts, submitted with said petition; and that he knows of the above proceedings had, and that the acts and facts in said petition stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me the day and year first above written.

CARLTON SPENCER,
Notary Public.

We do hereby each certify that we each carefully have examined the foregoing petition for writs of certiorari; that the allegations thereof are true, as we each verily believe, and in the opinion of each of us the petition is well founded and each of the cases is one in which the prayers of the petition should be granted by this Court.

LEE M. FRIEDMAN,
LOUIS B. KING,
Counsel for Petitioner.

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MASSACHUSETTS

Law No. 3210

GEORGE A. OHL & COMPANY
Plaintiff

v.

A. L. SMITH IRON WORKS
Defendant

Law No. 3267

A. L. SMITH IRON WORKS
Plaintiff

v.

GEORGE A. OHL & COMPANY
Defendant

CERTIFICATE OF JAMES S. ALLEN, CLERK

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, and the custodian of its files and of the files and records of the former Circuit Court for the District of Massachusetts, do hereby certify that:—

1. I have been Clerk of this District Court since July 2, 1917. The deputy clerks of this court have been employed in this office for varying lengths of time, one of them having commenced his service in this court in 1888; another in the Circuit Court in 1894; another in 1898, and another in 1907. Prior to making this certificate, I have inquired as to the matters herein stated of each of the deputy clerks who have

had familiarity with appellate records in this court or the old circuit court, including the four above referred to, and this certificate is based upon the memory and recollection of each of these deputy clerks, as well as my own.

2. For many years, bills of exceptions in this district have frequently been signed by trial judges with initials only, and bills thus signed have been, so far as we know, universally regarded both by the judges, the clerks and deputy clerks, and the bar generally, as sufficiently allowed and signed for appellate purposes. Very many bills of exceptions thus signed by the trial judge with initials only have formed a part of the record for appellate review and have constituted a part of the record entered in the United States Circuit Court of Appeals for the First Circuit. Prior to the hearing and decision by said Circuit Court of Appeals of the above entitled cases, this practice has never been commented upon, criticised or condemned by the judges of this court or of said Circuit Court of Appeals, so far as my deputies and I can recall; and so far as we can recall, until the above entitled cases were decided, every case in which the bill of exceptions was signed by initials only has been treated and disposed of by the said Circuit Court of Appeals as though the bill of exceptions was sufficiently signed and authenticated.

3. In each of the following cases appealed from this court to the Circuit Court of Appeals, the bill of exceptions was signed by the judge with his initials only, and was disposed of on its merits and without criticism of said signature by said Court of Appeals. I have made no effort to locate all such cases, the few mentioned being cited merely as an illustration of the custom and without attempting to show how frequently or during how long a period the custom has existed:—

Law 1794 National Shawmut Bank v. Boston 1925
7 F. (2) 1020 (case 6)

Crim	5609	Capuano v. United States 9 F. (2) 41	1925
Law	484	Wing v. McCallum, 16 F. (2) 645; 30 F. (2) 505; 31 F. (2) 940.	1927
"	4087	Mitchell Woodbury Corp. v. Albert Pick Barth Co. Inc. et al. et Tr. 41 F. (2) 148.	1929
"	3926	Harry Ford v. United States 44 F. (2) 754	1930
"	2700	Robert M. Leach, Ex'r. v. Malcolm E. Nichols, Collector 42 F. (2) 918; 50 F. (2) 787	1930
"	3762	Agnes T. Carville, Admx. v. N.Y.C. RR. 53 F. (2) 153	1931
"	3763	Emma E. Staples, Admx. v. N. Y. C. RR. 53 F. (2) 153	1931
"	3498	Nonantum Investment Co. v. Maryland Casualty Co. 56 F. (2) 329	1931
"	4273	Gertrude L. Holmes v. The Ginter Restaurant Co. 54 F. (2) 876	1931
"	4216	Evelyn Ellsmore v. Erlanger Tremont Theatre Corporation 56 F. (2) 809	1931
"	4230	John Farr, Jr. et al. v. N. E. Trust Company 57 F. (2) 103	1931
Crim	9544	United States v. Edward Cohen 56 F. (2) 28	1931

This certificate is made at the request of counsel for George A. Ohl & Co. respectively plaintiff and defendant in the above entitled cases.

In Testimony Whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District this 2nd day of June, A. D. 1932.

JAMES S. ALLEN

James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts

[Seal of Court]

Original of above submitted with original petition.

Supreme Court of the United States.

OCTOBER TERM, 1932.

No.

GEORGE A. OHL & COMPANY, PETITIONER,

v.

A. L. SMITH IRON WORKS, RESPONDENT.

No.

SAME *v.* SAME.

Brief in Support of Petition for Writs of Certiorari.

A.

STATEMENT OF CASE, QUESTIONS RAISED AND ERRORS ASSIGNED.

The trial judge wrote at the end of an assented to and meritorious bill of exceptions: "Allowed, August 20, 1930.

J. A. L.
D. J."

(R. 219, 221, 236, 237.)

He followed a long-established practice at least tacitly approved and not before criticized by the Circuit Court of Appeals for the First Circuit. That practice was first challenged by this respondent just before argument, practically nine months after appeals in these cases had been entered (Petition, p. 4). Because of the form of the signature of the district judge on the bill of exceptions the Circuit Court of Appeals, not as a matter of discretion, but because of its ideas of the limitations of its power, refused to consider the merits of the appeal, refused to treat the defect as amended, refused opportunity for amendment and affirmed the District Court judgments (R. 269).

57 F. (2d) 44.

The resultant facts and errors are:

1. This decision is in conflict with another Circuit Court of Appeals decision which had established the practice of the Federal Courts years ago.

2. Two important Federal statutes regulating practice are misinterpreted.

(*a*) The trial judge's personal mistake was "harmless error" within U.S. Code, tit. 28, sec. 391.

(*b*) The mistake was amendable within U.S. Code, tit. 28, sec. 777.

The Circuit Court of Appeals not only erroneously interpreted, but misapplied, these statutes.

3. The rule of "judgment term," limiting action after the expiration of the judgment term, was erroneously applied by the Court in deciding that the application of this rule precluded a curing of an error such as here existed.

4. That the case was pending in the Circuit Court of Appeals when the question was first raised does not prevent amendment. That the Court was in error in deciding the contrary.

5. So far as the Circuit Court of Appeals had discretionary power, on the facts of these cases, where the signature of the trial judge was in accordance with recognized custom and where the established practice of the circuit showed a long-continued condonation of that custom, the Circuit Court of Appeals did not use a sound judicial discretion in inflicting on the appellant so severe a penalty for a fault for which it was in no wise blameworthy.

Compare *Barber Asphalt Co.* v. *Standard Co.*, 275 U.S. 372, 386-387.

B.

THERE WAS MERIT IN THE BILLS OF EXCEPTIONS WARRANTING JUDICIAL REVIEW.

We assume that if there was plainly no merit in our bills of exceptions, relief would not be granted us. We therefore

outline some of the substantial issues involved in the trial, without arguing them to show that the questions raised merited consideration in the Court of Appeals.

1. The contract in issue was formal, complete, written, signed and sealed (R. 11-14). Yet the trial Court refused so to construe it (R. 250, Assignment 33).

2. The trial Court violated the parol-evidence rule in admitting evidence of negotiations prior to the making of the contract upon which was based a claim of implied warranty inconsistent with the express warranty (R. 238, Assignment 1). The trial Court refused to construe the contract on material issues, and left its construction largely for the jury (R. 241, Assignment 2; R. 251, Assignment 34; R. 252, Assignment 35; R. 253, Assignment 36).

3. The trial Court ruled that there was an implied warranty "that the machine would do perfect work" (R. 214, 253, Assignment 36).

4. The defects claimed by the buyer were actually observed on April 15, 1926 (R. 8, 9, 10). The first notice claimed was on June 25, 1926 (R. 9, Specification 9; R. 30, Exhibit CC), which the trial Court ruled to be in error (R. 83, 84), describing a defect that did not exist (R. 75, 80, 82). The next notice claimed was August 13th (R. 9, Specification 9-B; R. 32, Exhibit EE)—120 days after the claimed defects had been observed in actual operation (R. 8, Specifications). Yet the trial Court ruled as a matter of law that notice was given seasonably under the Sales Act (R. 255, Assignment 41; R. 257, Assignment 42).

5. The trial Court refused to require the buyer to elect between its inconsistent remedies, recoupment defense or breach of warranty action in accordance with the Sales Act of Massachusetts, General Laws, c. 106, sec. 58 (1 *a*, *b* (2)). *Mark* v. *Stuart Howland Co.*, 226 Mass. 35 and 43 (R. 249, Assignments 26, 27).

6. The machine was delivered March 15, 1926 (R. 8, Specification 1; R. 62). By the respondent in an experi-

ment it was broken October 15, 1926 (R. 94), after being in use six months (R. 8, Specification 2). The jury was charged on May 7, 1929 (R. 5). Yet on damages the Court instructed the jury to find the value of the machine, once "before it broke" and again "in its present condition" (R. 216; R. 258, Assignment 48).

7. In a trial which took three weeks (R. 4) the judge charged the jury in this very technical and complicated case for not over ten minutes (R. 213-217, Assignments 50, 51, 52; R. 218, Exceptions R, S, T).

8. Under the charge and verdicts the respondent was permitted to keep the merchandise (R. 215, line 28), to get back the $4963 it paid for it (R. 32, Exhibit EE; R. 215, 216), the $2531.75 it spent for repairs (R. 110, 216), a total of $7494.75, included in its $7500 verdict (R. 234), and is excused from paying the $6504 note balance owed for it (R. 5). On this charge and these verdicts the respondent keeps the machine, the motor and dies, about the last two of which there never was any issue raised (R. 215), for all of which it pays nothing at all.

We invite a reading of the original brief to the merits filed for the petitioner, a copy of which accompanies the petition herein.

C.

ARGUMENT.

I.

The Present Decision is in Conflict with the Practice Established by Another Federal Circuit Court of Appeals, and Introduces Uncertainty into Federal Procedure and Practice.

It is, of course, difficult to get reported cases from Circuit Courts of Appeals dealing with a situation such as ours as, we believe, most of such cases were so liberally dealt with as to be handled without opinions on such issues. Reported decisions where this issue has arisen are almost nil. The

one Circuit Court of Appeals which has dealt with the same principle and in an identical situation is the Eighth Circuit. The case arose in 1924:

"The first ground of the motion to dismiss rests upon this condition of the bill of exceptions. At the end of the recital of the proceedings at the trial appears the usual form of an approval of the bill of exceptions with the dates blank and the place for the signature of the judge blank, just over the words:

" 'Judge District Court of U. S. Southwestern Division, Western District of Missouri.'

"Also below this appear the words:

" 'The above and foregoing bill of exceptions is hereby approved, Griffin & Orr, Attorneys for Defendant William J. Burns International Detective Agency, Inc. McReynolds and McReynolds and John Flanigan, Attorneys for First National Bank of Sarcoxie, Missouri.

" 'Let the bill be filed and the filing show of record as of this 25th day of February, 1922.

ARBA S. VAN VALKENBURGH, Judge.'

"This condition of the bill of exceptions convinces that counsel for the plaintiff prepared it, and submitted it to the counsel for the defendants; that thereafter counsel for the plaintiff either presented it or caused it to be presented to the trial judge; that he intended to allow and certify it in the usual form, but by mistake wrote his name in the last blank for his signature, instead of in the blank at the foot of the usual certificate. He would not have ordered the bill of exceptions filed, if his mind had not assented to its approval, and as counsel for the defendants stipulated that the bill of exceptions was correct, the mistake of the judge in the placing of

his signature ought not to deprive the plaintiff of the benefit of her writ of error. U. S. Compiled Statutes, §1591. The motion to dismiss the writ of error is therefore denied."

Steen v. *First National Bank*, 298 Fed. 36, 37, 38 (C.C.A. 8).

This case has stood unchallenged as a precedent for the intervening eight years until the decision of our Court. Our case and this cannot be distinguished on principle. We therefore ask this Court to speak authoritatively as to which of these equally ranking decisions is to be the law.

II.

Liberalized Federal Practice Does Away with Such Technicalities of Procedure as were here Applied.

From the very beginning in 1789 there has been a constantly growing, distinct and vocal public sentiment that the administration of justice in our Courts should be brought up to date and the law freed from slavish adherence to precedents which from one cause or another had grown into hard and fast rules of procedure as the law made its slow progress from mediaeval lawyers' refinements to become a working machine for administering practical justice.

In response to this popular demand Congress in 1915 passed an act doing away with some still persisting artificialities of Federal pleadings and procedure. This act freely allowed at any stage amendments of pleadings and a change of form of action from equity to law or from law to equity (U.S. Code, tit. 28, sec. 397); and provided for the interposition of equitable defenses and the granting of equitable relief in actions at law; gave the Appellate Courts full power to render such judgment upon the record as law and justice required without too nice a regard to technicalities (U.S. Code, tit. 28, sec. 398); also permitted to be shown

at any stage in the litigation that Federal jurisdiction based on diversity of citizenship existed (U.S. Code, tit. 28, sec. 399).

Act March 3, 1915, c. 90.

In 1919, as another step of progress, Congress passed an additional act further unfettering Federal Appellate Courts by giving them power to render decisions based on the substantial rights asserted by litigants even though there were procedural defects in presenting them. There was then added to the Judicial Code the provision:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."
>
> St. February 26, 1919, c. 48, now part of U.S. Code, tit. 28, sec. 391.

This as well as all these Federal statutes of similar nature previously enacted were—

> "designed to free the administration of justice in the Federal courts from all subtle, artificial and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits."
>
> *McDonald* v. *Nebraska*, 101 Fed. 171, 176 (C.C.A. 8).

The "defects" and "technical errors" which the last statute eliminates have to do with shortcomings in the technique of the judicial procedure which a litigant must use to assert his substantial rights. The shortcoming here in the form of the judge's signature authenticating an agreed upon

bill of exceptions concerns only the method of asserting our rights. Where this Court in modern practice has enforced with any strictness rules relating to bills of exceptions, it has done so for "substantial" and not "technical" errors.

> "Strict requirements are thus insisted on so as to make certain that the reviewing court shall have before it an accurate account of the evidence or exhibits, which were before the trial court in the original hearing of the issues of the case, properly certified."
>
> *Krauss Brothers Lumber Co.* v. *Mellon*, 276 U.S. 386, 390.

The case at bar presents no uncertainty as to the record, for the Appellate Court can completely ignore the defective signature and rely on other recitals of the record certified under seal by the clerk of the District Court (R. 226, 263) which show:

> "On the 20th day of August A. D. 1930, the substitute bill of exceptions, motion to amend substitute bill of exceptions and the bill of exceptions concerning the plaintiff's motion for a new trial are allowed" (R. 6).

Record, 7, shows entered on the bill of exceptions:

> "Filed August 8, 1930; amended and allowed August 20, 1930."

To a like effect see R. 221, 236, 237.

This same problem was present in one of our recent Massachusetts cases where a Superior Court judge endorsed with initials only a denial of a motion to vacate judgment. The Appellate Court felt constrained to hold that the initials must be disregarded as a judge's signature, but the official attestation of the clerk of the lower Court to the effect that the motion to vacate judgment had been denied appear-

ing in the record the Appellate Court took official cognizance of the record as a whole.

Fairbanks v. *Beard*, 247 Mass. 8, 9.

It is respectfully submitted that our case shows no "total failure to observe an important regulation in matter of substance" as in *Barber Asphalt Co.* v. *Standard Co.*, 275 U.S. 372, 384.

Under this statute what is incumbent upon an Appellate Court is that the Court be—

> "required, however, by the Act of February 26, 1919 (U. S. C. A. §391) on hearing of an appeal, to give judgment 'after an examination of the entire record before the court, without regard to technical errors, defects or exceptions, which do not affect the substantial rights of the parties' . . . courts exist to do justice; and it would be a reproach to any legal system to deny a litigant relief, to which upon his pleadings and proof he is entitled, merely because his counsel have come in by the wrong door of the court."
>
> *Clarksburg Trust Co.* v. *Commercial Casualty Ins. Co.*, 40 F. (2d) 626, 634 (C.C.A. 4).

The case at bar presents an instance of where there was an almost complete compliance with all requirements, imperfect only in that the judge signed his name informally. The mistake was not that of a litigant, but solely that of the judge. It was at worst a mere irregularity of form. There is no question but that it was the judge's signature. The fact that he did not write his name in full was an error of the most harmless kind, in no way doing any injustice to the respondent. If ever an error can be "harmless," is not this an extreme instance? If ever a defect is "technical," is not this the most technical of such defects?

III.

The Mistake was Amendable.

The amendment asked was only to perfect a partial or imperfect authentication of the bill. It sought only to give effect to the trial judge's act allowing the bill. It neither amends nor disturbs the judgments themselves, nor imports or detracts any substantive item not already in the case.

> "DEFECTS OF FORM; AMENDMENTS.—No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, *in any court* of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."
>
> U.S. Code, tit. 28, sec. 777.

From the beginning this Court announced, and all Federal Courts consistently have followed, that the intended purpose of the statute is remedial, entitled to a most liberal construction and intended to avoid miscarriage of justice through technical faults of form.

> "The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the judiciary act of 1789, c. 20 (now section 954, Rev. St. U. S.) and quite as broadly, to say the least, as it is possessed by any other courts in

England or America, and it is upheld upon principles of the soundest protective policy."

Matheson's Adm'rs v. *Grant's Adm'r,* 2 How. 263, 281 (per Story, J.).
Norton v. *Larney,* 266 U.S. 511, 516.
Taylor Co. v. *Anderson,* 275 U.S. 431, 438.

"The discretion of the court to allow amendments is so clearly conferred by section 954 of the Revised Statutes (U. S. Comp. St. 1901, p. 696) that it is unecessary to cite any of the numerous cases on the subject. When a party gets his cause of action, or his defense, or his appeal, before a court of competent jurisdiction, he should not be turned out before trial of the merits of the controversy, except in obedience to a clear statutory mandate, or on a showing of gross carelessness or bad faith. The absolute dismissal of a plea or an appeal, for error in a matter of mere procedure, is in reality the infliction of the severest penalty for a minor fault, and is suggestive of the excessive punishments formerly inflicted for minor offenses in the administration of the criminal law. Conformity to rules of procedure is important, but usually it may be secured by imposing as a condition of amendment the payment of costs or other penalty, short of dismissal, on the party or his counsel, as circumstances may require, for negligence or inadvertence."

Bedford v. *J. Henry Miller, Inc.,* 212 Fed. 368, 370 (C.C.A. 4).

"Under section 954 of the Revised Statutes the right of amendment extends to the 'summons, writ, declaration, return, judgment, and other proceedings in civil causes in any court of the United States,' and may be exercised at any stage of the case, even after trial and judgment. The extended and beneficent use made of the

> authority given by this section to make amendments is disclosed by a long line of decisions of the supreme court of the United States covering every step in a case from the summons to the verdict and judgment."
>
> *McDonald* v. *Nebraska,* 101 Fed. 171, at 177 (C.C.A. 8).

Under this statute the power of an Appellate Court "in its discretion to allow such amendments—and its duty to do so in appropriate cases, cannot be doubted."

Norton v. *Larney,* 266 U.S. 511, 516.

Allowance of a bill of exceptions is the main element. Signature is the form by which that allowance is evidenced. It is like a writ, issuing from Court, lacking a seal of the Court, or a signature, or wanting some other such element. In such instances Federal Courts have repeatedly declared such defects in writs, as lack of a seal, lack of a return day, or lack of the proper signature, lack of the proper test, or the like mere matters of form, capable of amendment.

United States v. *Turner,* 50 Fed. 734.
Cotter v. *Alabama, G. & S. R. Co.,* 61 Fed. 747.
Bryan v. *Ker,* 222 U.S. 107, 112.
Miller v. *Texas,* 153 U.S. 535.
Texas & Pacific Ry. Co. v. *Kirk,* 111 U.S. 486, 487.

Moreover the bill, with its authentication, whether complete or imperfect, is a record of the trial Court (*Pomeroy's Lessee* v. *Bank of Indiana,* 1 Wall. 592, 599), and as such the authentication at least is capable of amendment by that Court. While a record cannot lawfully be amended after the term unless there is official evidence on which to base an amendment, and something to amend, where those two elements exist the amendment may be had *nunc pro tunc.* This Court has said that even where there is no evidence of official

action beyond the judge's recollection of the facts, any entry justified by such recollection may be made *nunc pro tunc.*

In re Wight, 134 U.S. 136.
Michigan Ins. Bank v. *Eldred,* 143 U.S. 293, 299.
In re Plymouth Cordage Co., 135 Fed. 1000, 1003 (C.C.A. 8).
Brown v. *United States,* 196 Fed. 351, 353 (C.C.A. 7).

It is a puzzle to us just why our Court chose to pick out *Origet* v. *United States* as its precedent. The six cases from this Court which have touched this subject, the other five both preceding and following *Origet* v. *United States,* we submit recognize that a defective authentication may be amended.

The principle which we urge—that defective authentication is amendable—is illustrated in the decisions of this Court, one of which seems to deny and five to recognize it.

1. *Mussina* v. *Cavazos,* 6 Wall. 355, at 363 (1867):

> "Whatever might be our opinion of the exceptions which appear in the record, if they were presented in such a way that we could consider them, we find them beyond our reach. The bill of exceptions, or what purports to be a bill of exceptions, covering more than three hundred and fifty pages of the printed record, is neither signed or sealed by the judge who tried the case; and there is nothing which shows that it was submitted to him or in any way received his sanction."

The underlined clause was unnecessary to the decision unless the Court considered the defect amendable had there been anything "which shows that it was submitted to him (the trial judge) or in any way received his sanction."

2. *Blitz* v. *Brown,* 7 Wall. 693, at 694 (1868):

The clerk's certificate to the transcript of record submitted on writ of error was a blank form without seal of court or signature of clerk. Held, there was no authentication whatever, so the Court was without jurisdiction and the writ was dismissed.

3. *Origet* v. *United States,* 125 U.S. 240, 243, 244 (1888):

The bill of exceptions was signed "A. B." The Court held the initials "A. B." not the signature of the judge, not a sufficient authentication, nor sufficient evidence of its allowance by the judge of the Court and refused to consider its contents. There was nothing to show who "A. B." was, or anything to indicate that if properly authenticated the bill of exceptions merited a review, or that any effort had earlier been made to have the mistake corrected. The implication is that the right of amendment was denied.

4. *Idaho & Oregon Land Co.* v. *Bradbury,* 132 U.S. 512, 513 (1889):

This was a case of defective authentication of the transcript of the record. The certificate of the clerk was complete except for signature, which was omitted. Although recognizing the authority of *Blitz* v. *Brown,* the Court here held:

> "The question presented is not one of no authentication, but of irregular or imperfect authentication; not of jurisdiction but of practice. It is, therefore, within the discretion of this court to allow the defect to be supplied. Considering that the motion to dismiss was not made until it was too late to take a new appeal or writ of error, justice requires that the record should be permitted to be withdrawn for the purpose of having the certificate of authentication perfected by adding the signature of the clerk."

This decision overrules the implication in the Origet case.

5. In *Michigan Insurance Bank* v. *Eldred*, 143 U.S. 293, 298, 299, this Court considered specifically the question of amending bills of exception, seasonably filed, after the judgment term, and held:

> "By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end. . . .
>
> "The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court; the trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed. Hanna v. Mass. 122 U. S. 24. Any fault or omission in framing or tendering a bill of exceptions, being the act of the party and not of the court, cannot be amended at a subsequent term, as a misprision of the clerk in recording inaccurately or omitting to record an order of the court might be. In re Wight, 134 U. S. 136."

The entire second paragraph, and especially the last sentence, was unnecessary unless the Court recognized the possibility of amendment after the judgment terms *for "fault or omission of the court."*

6. This Court last dealt with imperfect authentication of a bill of exceptions in *United States (Ex Rel. Kinney)* v. *U.S. Fidelity & Guaranty Co.*, 222 U.S. 283, 284:

> "As to the contentions which relate to occurrences at the trial, they cannot be considered, as the record contains no bill of exceptions. The paper in the record styled 'Exceptions to the charge to jury,' initialed 'J. B. McP., trial judge,' and signed by the plaintiff, is not a bill of exceptions (Origet v. United States, 125 U. S. 240, 243), but if it were to be treated as a bill of exceptions as all the matters therein referred to depend for their solution upon an examination of the evidence which is not in the record, it follows that we have no means of determining whether reversible error arose from an action of the court on any of the subjects to which the paper refers. This being the case, it becomes our duty to affirm."

This clause underlined was unnecessary unless the power of amendment existed to be exercised in a meritorious case even after judgment term.

IV.

"Judgment Term."

Our Circuit Court of Appeals decided that it was too late to send the case back for amendment, as the term at which the judgments had been entered had expired and the District Court had lost jurisdiction (R. 269). We do not question that the general rule is:

> "That the bills of exceptions shall be signed before the trial court loses jurisdiction of the cause by expira-

tion of the term or such time thereafter as may have been duly prescribed."

Exporters v. *Butterworth-Judson Co.*, 258 U.S. 365, 369.
Walton v. *United States*, 9 Wheat. 651, 657-658.

". . . This rule is not without exceptions that there may be circumstances justifying the signing of the bill after the expiration of the term at which trial was had. The rule is not an iron clad rule. It is a rule for the protection of the rights of parties, but is not to be applied with vigor to defeat the ends of justice where the party seeking relief is without fault. . . . But there may be circumstances not resulting from laches of the parties which should avail to relax the rule."

Western Dredging & Imp. Co. v. *Heldmaier*, 116 Fed. 179, 182 (C.C.A. 7).

Not only where the circumstances of a particular case have justified it has a bill of exceptions been allowed by a trial judge after the expiration of the judgment term, but even required by mandamus.

Such exceptions have been recognized by this Court.

Under "very extraordinary circumstances":

Muller v. *Ehlers*, 91 U.S. 249, at 251.
Jones v. *Grover & Baker Sewing Machine Co.*, 131 U.S. Appx. cl.
Michigan Insurance Bank v. *Eldred*, 143 U.S. 293, 298.

Where justice requires a suspension of the rule:

United States v. *Breitling*, 20 How. 252, 254.
Dredge v. *Forsyth*, 2 Black, 563, 568.

Under "special circumstances":

Hume v. *Bowie*, 148 U.S. 245, 253.

Where delay is caused by the judge and assent is given within the term:

Davis v. *Patrick*, 122 U.S. 138, 143.
Waldron v. *Waldron*, 156 U.S. 361, 378.

Where the opponent is estopped from objecting to a late signature:

Chateaugay Ore & Iron Co., Petitioner, 128 U.S. 544, 555.

Where delay is through fault of opponent:

Hunnicutt v. *Peyton*, 102 U.S. 333, 355.

For "sufficient reason":

Hunnicutt v. *Peyton, supra.*

Where the judge is away, consent seasonably given:

Taylor v. *United States*, 52 Sup. Ct. Rep. 466.

Where the fault is the court's:

Michigan Insurance Bank v. *Eldred, supra*, at 299.

In our Circuit Courts of Appeals the following have been held sufficient within the recognized exceptions:

Inability of Court stenographer to transcribe notes on exceptions:

Dalton v. *Gunnison*, 165 Fed. 873 (C.C.A. 9).

Trial judge ill:

Roberts v. *Bennett*, 135 Fed. 748 (C.C.A. 2).
Re Bills of Exceptions, 37 F. (2d) 849, 851 (8) (C.C.A. 6).

Exhibits mislaid without fault of excepting party:

Pittsburgh Gas & Coke Co. v. *Goff-Kirby Coal Co.*, 151 Fed. 466 (C.C.A. 3).

Presented in time, but delay in settling:

Southwest Metals Co. v. *Gomez*, 4 F. (2d) 215, 218 (C.C.A. 9).

Refusal of judge to sign in form submitted:

Scaife v. *Western North Carolina Land Co.*, 87 Fed. 308 (C.C.A. 4).

Delay for convenience of trial judge:

Western Dredging & Improvement Co. v. *Heldmaier*, 116 Fed. 179 (C.C.A. 7).

Oral order only of trial judge at time of directing verdict:

Koewing v. *Wilder*, 126 Fed. 472, 474 (C.C.A. 2).

Delay occasioned by adversary or judge:

Franklin County v. *Furry*, 144 Fed. 663, 664 (C.C.A. 7).

Seasonably stipulated for settlement, but delay caused by judge:

Schmid v. *Standard Steel Car Co.*, 202 Fed. 1023 (C.C.A. 2).

Excepting party not guilty of neglect, bill presented in time, judge refused to sign:

Re Federal Life Insurance Co., 248 Fed. 908 (C.C.A. 7).

Where the parties have done all they can:

Re Bills of Exceptions, 37 F. (2d) 849, 851 (9) (C.C.A. 6).

Some of these cases turn on consent of an opponent given during the term. As jurisdiction is never conferred by consent (*Exporters* v. *Butterworth-Judson Co.*, 258 U.S. 365,

369), it follows that the rule and its exceptions are procedural and not jurisdictional, to be enforced to accomplish, and not to defeat, substantial justice.

Each of our bills contains a prayer for allowance. Each is assented to without limitation. The assent continues until all that is necessary is done to give the bills their intended legal effect and brings them within the "consent" exceptions, *supra*. The other facts of our case bring these bills within the principle of the other exceptions to the rule. They actually and seasonably were allowed (R. 219, 222, 236, 237).

If the defect was so amendable within these exceptions to this general rule, then the amendment was one which the District Court was bound to make, and the Circuit Court of Appeals had both the power and duty to treat the bills as amended and act accordingly.

Norton v. *Larney*, 266 U.S. 511, 516.

V.

Appeal Does Not Prevent Relief.

Treating the case as one where "the District Court has lost jurisdiction of the case" (R. 269) by reason of the judgment term expiration and the appeal, the Circuit Court of Appeals held that both it and the District Court were without power now to amend or to correct a "harmless error." The fact of an appeal pending in the Circuit Court of Appeals does not prevent any relief otherwise proper.

Barber Asphalt Co. v. *Standard Asphalt & Rubber Co.*, 275 U.S. 372, 386, 387.

VI.

A Reactionary and Unworthy Decision.

This decision sounds a century late. It belongs to the period of one hundred years ago, when the prisoners were

acquitted because the property stolen was that of Marie Jones and not that of Mary Jones. Decisions like this rankle, and are a blot on the judicial escutcheon. It works an injustice in the case at bar. That is bad enough, but, worse, it establishes a narrow precedent encouraging practitioners to treat the practice of the law as a game to be won by nimble wits manipulating trivialities.

In his request the district judge sets forth that the error in the signature was his, for which counsel for appellant was in no way responsible (R. 312). The course followed was in accordance with the common practice in Massachusetts, condoned by this very Circuit Court of Appeals (Petition, p. 8). If the Court felt these bills were not properly authenticated, it affirmed the judgments "because of the transgression—and this notwithstanding the transgression was largely due to its own course of action." Had it previously in the early days of this practice discountenanced such signatures, the District Court judges and clerks would have changed the practice. Under these circumstances affirming the judgments "was a very severe penalty to impose for action which had the court's implied sanction up to that time." Here the Circuit Court "passed the bounds of a sound ~~transgression~~ in affirming the" judgment "because of the transgression." The fault being the trial judge's personal fault, and not your petitioner's, the Circuit Court "should have remitted the transcript to the District Court to the end that a further opportunity might be had to comply with the" rule.

Barber Asphalt Co. v. *Standard Asphalt & Rubber Co.*, 275 U.S. 372, 386, 387.

But even beyond this, such a technicality is unworthy of modern practice of law. The decision itself was unnecessary and undesirable, not merely because it worked an injustice, but as a step backwards in face of the precedents, and the liberalized decisions of this Court.

It is respectfully submitted that the writs in each case herein prayed should issue to the end that these cases may be disposed of upon their merits and that a proper Federal practice may be established.

Respectfully submitted,
FRIEDMAN, ATHERTON, KING & TURNER,
LEE M. FRIEDMAN,
LOUIS B. KING,
Counsel for GEORGE A. OHL & COMPANY,
Petitioner.

FILE COPY

Office Supreme Court, U. S.
NOV 23 1932
CHARLES ELMORE CROPLEY

Supreme Court of the United States.

October Term, 1932.

No. 228.

George A. Ohl & Company,
Petitioner,

v.

A. L. Smith Iron Works,
Respondent.

No. 229.

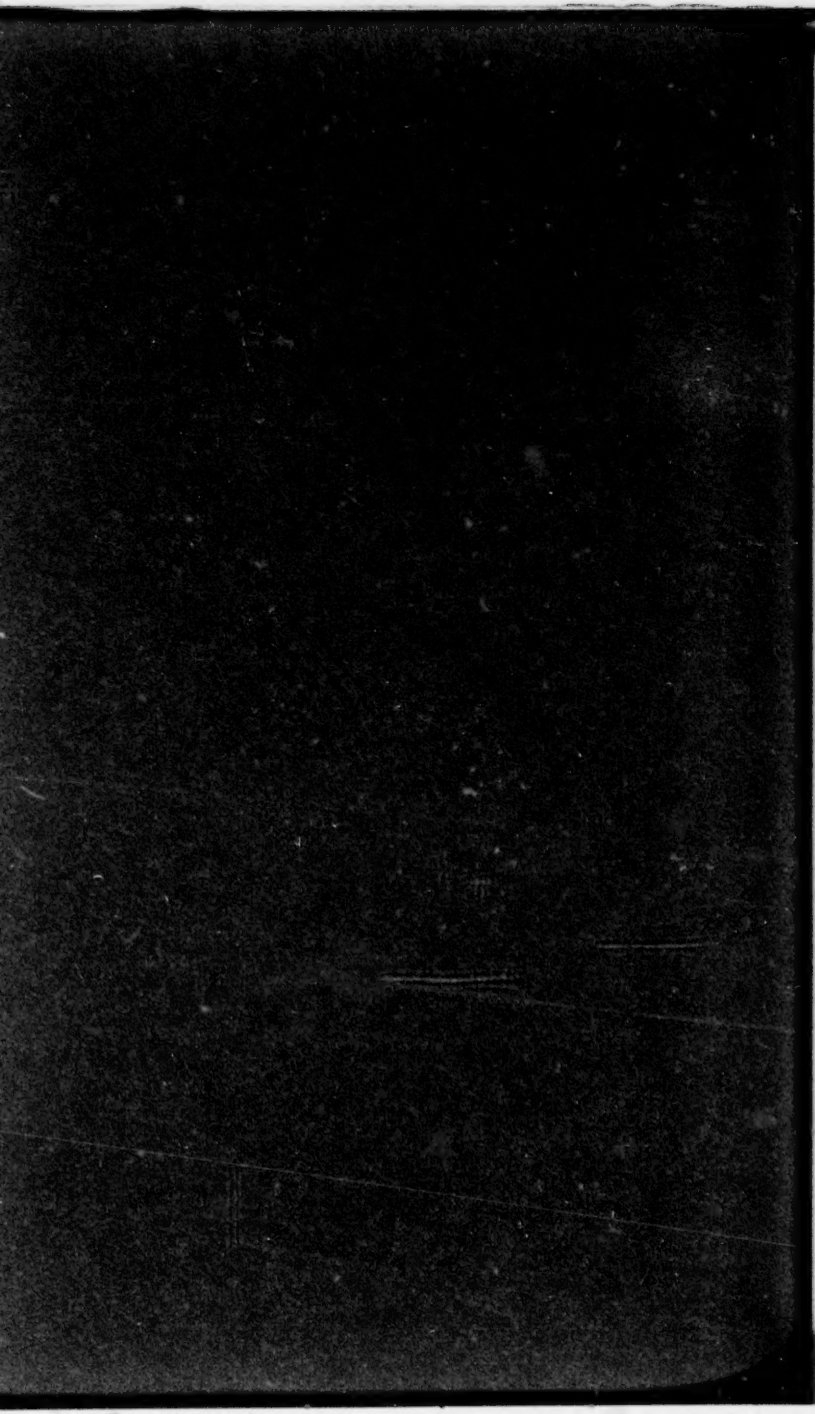
Same v. Same.

Brief for Petitioner on Writs of Certiorari to the Circuit Court of Appeals for the First Circuit.

LEE M. FRIEDMAN,
LOUIS B. KING,
FRIEDMAN, ATHERTON, KING & TURNER,
Attorneys for Petitioner.

30 State Street,
Boston, Mass.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.



INDEX.

Part One

	Page
ATEMENT OF THE TECHNICAL ISSUES RAISED AND ERRORS ASSIGNED	1
GUMENT	4
The previous precedent in Federal procedure established a contrary practice	4
Liberalized Federal practice does away with such technicalities of procedure as were here applied	5
I. The mistake was amendable	12
II. "Judgment term"	18
Appeal does not prevent relief	23
. Respondent's claim of insufficient certificate	24
I. A reactionary and unworthy decision	25

Part Two

ECIFICATION OF ASSIGNED ERRORS URGED	27
ATEMENT OF FACTS	28
GUMENT	33
The effect of pleadings and of specifications	33
The contract in issue and its effect	34
(1) The contract is a Massachusetts contract	34
(2) The contract in issue is a formal written contract with an express written warranty	35
(3) There was no implied warranty of suitability, and parole evidence to prove such was erroneously admitted	38
(4) The construction of this contract was for the Court	40
(5) The Court misconstrued the contract and mistakenly included additional warranties	41
(a) "Bend" v. "Set"	41
(b) Warranty of perfection	47
(6) Claim based on insufficient safety devices	47

Page

C. Notice required under the Massachusetts Sales Act 50
(1) The law applicable 50
(2) Massachusetts Sales Act requirement 50
(3) What the notice must contain 52
(4) Notices given 57
Time when defects were first known 57
What the trouble really was 57
The first alleged notice 61
The second alleged notice 63
The third alleged notice 65
The fourth alleged notice 67
The fifth and sixth alleged notices 67
The seventh alleged notice 68
Conclusion under C 69
D. Ohl as plaintiff was entitled to a directed verdict, or, in the alternative, to have the Court require Smith to elect his remedy 69
(1) Directed verdict 69
(2) Buyer's election of remedies 73
E. Damages 75
(1) Market value 75
(2) Consequential damages—repairs 76
(3) The verdicts under the evidence and instructions 77
F. Exceptions based on admission and exclusion of evidence 80
(1) Test bars from broken stanchion 80
(2) Foundry guaranty 81
(3) Opinion evidence—omitting an essential 82
(4) United States government metal specifications were erroneously admitted 82
G. Additional exceptions to the charge and refusals to charge 83
(1) Assignments 45 and 46 83

Page
(2) The inadequacy of the charge 84
H. Exception to conduct of jurors 86
I. Ohl's motions for new trial 87
J. Conclusion 88

TABLE OF AUTHORITIES CITED.

Alderson v. General Electric Co., 210 Fed. 775 45
Am. Mfg. Co. v. U.S. Shipping Board E. F. Corp., 7 F. (2d) 565 54, 64
American Steam Gauge &c. Co. v. Mechanics &c. Co., 214 Mass. 299 55, 56
Aracan, The, 11 F. (2d) 791 34
Baltimore & Ohio R.R. Co. v. Groeger, 266 U.S. 521 56, 72, 88*n*.
Barber Asphalt Co. v. Standard Asphalt & Rubber Co., 275 U.S. 372 3, 10, 24, 26
Barnard v. Kellog, 10 Wall. 383 49
Barrett Co. v. Panther Rubber Co., 24 F. (2d) 329 38
Bast v. Bank, 101 U.S. 93 37
Bedford v. J. Henry Miller, Inc., 212 Fed. 368 13
Bennett v. Thompson, 235 Mass. 463 39
Bills of Exceptions, Re, 37 F. (2d) 849 22, 23
Bird & Son v. Guarantee Construction Co., 295 Fed. 451 35, 44, 46
Blitz v. Brown, 7 Wall. 693 16
Bloch v. Eastern Machine Screw Corp., 281 Fed. 777 54, 65
Bluegrass Canning Co. v. Steward, 175 Fed. 537 38, 40
Bodek & Son v. Avrach, 297 Pa. 225 54, 55, 64
Boothby v. Scales, 27 Wisc. 626 52
Boston Acid Mfg. Co. v. Moring, 15 Gray, 211 33
Boston Consolidated Gas Co. v. Folsom, 237 Mass. 565 39
Bowditch v. Slattery, 263 Mass. 496 38
Brace v. Gauge Kresno Construction Co., 36 F. (2d) 661 34

Page

Brown v. United States, 196 Fed. 351 15
Bryan v. Ker, 222 U.S. 107 14
Burrows & Kenyon v. Warren, 9 F. (2d) 1 41
Central Union Co. v. Edwardsville, 269 U.S. 190 35
Century Elec. Co. v. Detroit Copper & R.R. Mills, 264 Fed. 49 45
Chateaugay Ore & Iron Co., Petitioner, 128 U.S. 544 21
Cheek v. State, 35 Ind. 492 87
Chess & Wymond Co. v. LaCrosse Box Co., 173 Wisc. 382 51
Clarke v. Taylor, 269 Mass. 335 33
Clarksburg Trust Co. v. Commercial Casualty Ins. Co., 40 F. (2d) 626 11
Clyatt v. United States, 197 U.S. 207 24
Cook v. Castner, 9 Cush. 266 74, 77, 78
Cooper v. Philadelphia Worsted Co., 68 N.J. Eq. 622 35
Cotter v. Alabama, G. & S. R. Co., 61 Fed. 747 14
Cox v. Wiley, 183 Mass. 410 71, 72, 75
Crowe v. Trickey, 204 U.S. 228 24
Cudahy Packing Co. v. Narzisenfeld, 3 F. (2d) 567 49
Dalton v. Gunnison, 165 Fed. 873 21
Daniel v. Learned, 188 Mass. 294 73
Davis v. Patrick, 122 U.S. 138 21
Davis Calyx Drill Co. v. Mallory, 137 Fed. 332 38, 40, 47
DeWitt v. Berry, 134 U.S. 306 37, 38, 43, 45
Dickey v. Hurd, 33 F. (2d) 415 35
Dredge v. Forsyth, 2 Black, 563 21
Dunn v. Mayo Mills, 134 Fed. 804 38
Earnshaw v. United States, 146 U.S. 60 56
El Dorado Oil Works Co. v. Société Com. De L'Oceanie, 182 Fed. 195 37
Ewer's Admr. v. National Imp. Co., 63 Fed. 562 86
Exporters v. Butterworth-Judson Co., 258 U.S. 365 19, 23
Faber v. Mutual Life Ins. Co., 250 Mass. 250 41
Fairbanks v. Beard, 247 Mass. 8 10

	Page
Farmers State Bank &c. v. Parr, 234 Ill. App. 78	70
Federal Life Insurance Co., Re, 248 Fed. 908	23
Federal Surety Co. v. Minn. Steel & Machine Co., 17 F. (2d) 242	34
First National Bank v. Pipe &c. Co., 273 Fed. 105	56
Franklin County v. Furry, 144 Fed. 663	22
General Motors Corp. v. Abell, 292 Fed. 922	40
Gilmore v. Williams, 162 Mass. 351	74
Glachen v. Bennett, 226 Mass. 316	39, 40
Glenmore Woolen Mills v. Goldberg, 186 N.Y. S. 580	51
Goddard v. Foster, 17 Wall. 123	40
Gottsman v. Jeffrey, 268 Mass. 10	50
Gunnison v. Rollins, 173 U.S. 255	24
Hamilton v. Liverpool &c. Ins. Co., 136 U.S. 242	40
Hodgkins v. Moulton, 100 Mass. 309	69
Hogue-Kellogg Co. v. G. L. Webster Co., 22 F. (2d) 384	34
Hume v. Bowie, 148 U.S. 245	21
Hunnicutt v. Peyton, 102 U.S. 333	21
Hurnanen v. Nicksa, 228 Mass. 346	50
Idaho & Oregon Land Co. v. Bradbury, 132 U.S. 512	16
Indiana Flooring Co. v. Samuel Rudnick, 236 Mass. 90	70
International Agriculture Corp. v. Stadler, 212 Fed. 378	55
Jones v. Grover & Baker Sewing Machine Co., 131 U.S. Appx. cl.	20
Jones v. Revere Preserving Co., 247 Mass. 225	74
Kansas & A. Railway Co. v. Morton, 61 Fed. 814	34
Kauffman v. Levy, 169 N.Y. S. 454	63
Kilroy v. Schimmel, 243 Mass. 263	38
Koewing v. Wilder, 126 Fed. 472	22
Krauss Brothers Lumber Co. v. Mellon, 276 U.S. 386	9, 25
Lincoln v. Croll, 248 Mass. 232	55, 64
Lowenberg Co. v. Block, 140 N.Y. S. 375	51

Page

McDonald v. State of Nebraska, 101 Fed. 171 7, 8, 14
McGuire v. Gerstley, 204 U.S. 489 37
Maggioros v. Edson, 143 N.Y. S. 377 53
Mahoney v. Boston Elevated Railway Co., 271 Mass. 274 85
Mahoney v. Gooch, 246 Mass. 567 84
Mark v. Stuart-Howland Co., 226 Mass. 35 75
Marmet Coal Co. v. People's Coal Co., 226 Fed. 646 39, 40, 55
Matheson's Adm'rs v. Grant's Adm'r, 2 How. 263 13, 20
Maxwell v. Massachusetts Title Insurance Co., 206 Mass. 197 84
Miami Cycle & Mfg. Co. v. National Carbon Co., 268 Fed. 46 39
Michigan Ins. Bank v. Eldred, 143 U.S. 293 15, 17, 20, 21
Miller v. Texas, 153 U.S. 535 14
Moore v. Foss & Co., 18 F. (2d) 635 51, 54
Moss v. Sherburne, 11 F. (2d) 579 76
Moulton v. McOwen, 103 Mass. 587 77
Muller v. Ehlers, 91 U.S. 249 20
Murphy v. Gifford, 228 Mich. 287 44, 51
Murphy v. India Tire & Rubber Co., 29 F. (2d) 228 38
Mussina v. Cavazos, 6 Wall. 355 15
Nashua River Paper Co. v. Lindsay, 249 Mass. 365 54, 55, 65
National Wholesale Grocery Co. v. Mann, 251 Mass. 238 76
Newark v. Mills, 35 F. (2d) 110 38
Norton v. Larney, 266 U.S. 511 13, 14, 23
Origet v. United States, 125 U.S. 240 15, 16
Oscangow v. Arms Co., 103 U.S. 261 33
Parks v. Turner, 12 How. 39 7
Penser v. Marsh, 218 N.Y. 505 50
Peoples Electric Railway v. McKeen Motor Car Co., 214 Fed. 73 50

Page

Pitcairn v. Philip Hiss Co., 125 Fed. 110 40, 41
Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., 151 Fed. 466 22
Plymouth Cordage Co., In re, 135 Fed. 1000 15
Pomeroy's Lessee v. Bank of Indiana, 1 Wall. 592 14
Pratt-Gilbert Co. v. Hildreth, 24 Ariz. 141 52
Reed v. Allen, 52 Sup. Ct. Rep. 532 6
Regina Co. v. Gately Furniture Co., 154 N.Y. S. 888 52
Reliable Waste Co. v. Waterhead Mills, 238 Mass. 496 41
Reynolds v. General Elec. Co., 141 Fed. 551 39, 45
Roberts v. Bennett, 135 Fed. 748 22
Rosenbush v. Learned, 242 Mass. 297 49
Russell v. Martin, 232 Mass. 379 50
Savings Bank of Richmond v. Nat. Bank, 3 F. (2d) 970 35
Sawyer v. Worcester Consolidated Street Railway Co., 231 Mass. 215 85
Scaife v. Western North Carolina Land Co., 87 Fed. 308 22
Schloss Bros. & Co. v. Charles Stern Co., 36 F. (2d) 628 55
Schmid v. Standard Steel Car Co., 202 Fed. 1023 22
Seitz v. Brewers' Refrigerating Co., 141 U.S. 510 37
Seward Dredging Co., In re, 242 Fed. 225 50
Silverman v. Engel, 211 N.Y. S. 584 64
Skillings v. Collins, 224 Mass. 275 51
Southwest Metals Co. v. Gomez, 4 F. (2d) 215 22
Star Glass v. Morey, 108 Mass. 570 74
Stebbins v. Riley, 268 U.S. 137 35
Steen v. First National Bank, 298 Fed. 36 5
Tampa Shipbuilding & Eng. Co. v. General Const. Co., 43 F. (2d) 309 43
Taylor Co. v. Anderson, 275 U.S. 431 13
Taylor v. United States, 52 Sup. Ct. Rep. 466 21
Tegin v. Chapin, 176 Wisc. 410 53, 64
Texas & Pacific Ry. Co. v. Kirk, 111 U.S. 486 14

Page

The John Service, Inc., v. Goodnow, 242 Mass. 594 71
Tinius Olsen Test. Mach. Co. v. Wolf Co., 297 Pa. 153 53, 54, 56, 64
Trimount Lumber Co. v. Murdough, 229 Mass. 254 51
Truslow & Fulle, Inc., v. Diamond Bottling Corp., 112 Conn. 181 53, 71
Tucker v. Traylor Engineering & Mfg. Co., 48 F. (2d) 783 39
Union Selling Co. v. Jones, 128 Fed. 672 38
Union State Bank & Trust Co. v. Northwestern Life Ins. Co., 55 F. (2d) 1070 41
United States v. Breitling, 20 How. 252 21
United States v. Copper Queen Mining Co., 185 U.S. 495 25
United States v. Southern Dredging Co., 251 Fed. 400 34
United States v. Turner, 50 Fed. 734 14
United States (Ex rel. Kinney) v. U.S. Fidelity & Guaranty Co., 222 U.S. 283 18
Vicksburg &c. R.R. v. O'Brien, 119 U.S. 99 11
W. & S. Job Co., Inc., v. Heidritter Lumber Co., 255 Fed. 311 49
Waldron v. Waldron, 156 U.S. 361 21
Walton v. United States, 9 Wheat. 651 19
Wastum v. Lincoln National Life Ins. Co., 12 F. (2d) 422 34
Western Dredging & Importing Co. v. Heldmaier, 116 Fed. 179 19, 20, 22
Wight, In re, 134 U.S. 136 15
Wildman Mfg. Co. v. Davenport &c., 147 Tenn. 551 54, 56, 65
Williams v. Winthrop, 213 Mass. 581 84
Wright v. General Carbonic Co., 271 Pa. 331 51

Act March 3, 1915, c. 90 7
Act of June 1, 1872 (c. 255, sec. 3) 7

	Page
57 C.J. 358, sec. 1	74
Conformity Act, U.S. Code, tit. 27, sec. 724	33
Mass. G.L. c. 106, sec. 58 (1), (a)	74
Mass. G.L. c. 106, sec. 58 (1) a, b, (2)	73, 74
Mass. G.L. c. 106, sec. 58 (1) (a) (b)	88
Mass. G.L. c. 106, sec. 3 (3)	50
Mass. G.L. c. 106, sec. 14	37
Mass. G.L. c. 106, sec. 17 (1)	35, 46
Mass. G.L. c. 106, sec. 17 (3)	49
Mass. G.L. c. 106, sec. 17 (6)	35, 44, 47
Mass. G.L. c. 106, sec. 38	50, 89
Mass. G.L. c. 106, sec. 58 (2)	89
Mass. G.L. c. 106, sec. 58 (6) (7)	76
Mass. G.L. c. 107, sec. 47	72
Mass. G.L. c. 107, sec. 51	74
Mass. G.L. c. 231, sec. 29	72
Mass. G.L. c. 231, sec. 70	33
Mass. G.L. c. 231, sec. 87	33, 37
Mass. Law Quarterly, August, 1932, number, page 58	26
N.J. Comp. Stat. 1910, p. 4658	51
1 Select Essays in Anglo-American Legal History, 541 (1907), Charles Bowen	6
St. Feb. 26, 1919, c. 48, now part of U.S. Code, tit. 28, sec. 391	8
U.S. Code, tit. 28, sec. 347	3
U.S. Code, tit. 28, sec. 391	3
U.S. Code, tit. 28, sec. 397	7
U.S. Code, tit. 28, sec. 398	7
U.S. Code, tit. 28, sec. 399	7
U.S. Code, tit. 28, sec. 725	35
U.S. Code, tit. 28, sec. 776	19
U.S. Code, tit. 28, sec. 777	3, 12
U.S. Code, tit. 28, sec. 865	9
Webster's New International Dictionary (1930), page 209	42

	Page
Williston, Sales (2d ed.), sec. 7	50
Williston, Sales, sec. 215	38
2 Williston, Sales (2d ed.), 1259	51
2 Williston, Sales (2d ed.), 1261, sec. 484 a	51

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 228.

GEORGE A. OHL & COMPANY, PETITIONER,

v.

A. L. SMITH IRON WORKS, RESPONDENT.

No. 229.

SAME *v.* SAME.

Petitioner's Brief on Writs of Certiorari to the Circuit Court of Appeals for the First Circuit.

We have divided our brief into two divisions. The first dealing with the technical questions of the allowance of the bills of exceptions. The second with the merits of the exceptions.

Part One.

Statement of the Technical Issues Raised and Errors Assigned.

After a jury trial in the District Court for the District of Massachusetts, the petitioner presented bills of exceptions in due form and within a proper time to the district judge for allowance. The bills were assented to. The trial judge wrote at the end of the bills of exceptions: "Allowed, August 20, 1930.

J. A. L.

D. J."

(R. 223, 226, 238, 239.)

He followed a long-established practice at least tacitly approved and not before criticized by the Circuit Court of Appeals for the First Circuit (Clerk's Certificate, p. 8 of petition herein). That practice was first challenged by this respondent just before argument, practically nine months after appeals in these cases had been entered.* Because of the form of the signature of the district judge on the bill of exceptions the Circuit Court of Appeals, not as a matter of discretion, but because of its ideas of the limitations of its power, refused to consider the merits of the appeal, refused to treat the defect as amended, refused opportunity for amendment and affirmed the District Court judgments (R. 268).

57 F. (2d) 44.

---

*This point would probably not have arisen if respondent's counsel, after having assented to the bills of exceptions, shortly before oral argument in its brief for the first time had not questioned the sufficiency of Judge Lowell's signatures to these bills. Neither then nor later did they file or present any formal motion to that issue.

The claimed defect coming to your petitioner's actual knowledge for the first time just before argument in the Circuit Court of Appeals, your petitioner sought and believed it had in the limited time available found an answer to that issue under the statutes and authorities which it cited in a supplemental brief filed at the opening of its oral argument. Your petitioner first brought the question to the actual attention of the Circuit Court at the opening of its oral argument, defined the issue, stated that counsel thought his supplemental brief cited authorities enabling the Circuit Court to dispose of the issue in these cases, but asked that if the question became of moment he might further be heard and take such proceedings as might lie to cure any error.

The presiding judge, to counsel's statement that the issue turned on the fact that Judge Lowell had signed the bills of exceptions with his initials only, asked, in substance, "What difference does that make?" to which counsel replied in substance:

> "There is an old case in 125 U. S. where the Supreme Court said it did make a difference and while I feel my supplemental brief points out authorities which in this case enables this Court to deal with these bills on their merits I would like in case the Court does not agree with my ideas permission to be heard and to file such proceedings as may be necessary to cure the error."

The presiding judge replied in substance:

> "All right, proceed."

Oral argument was thereafter confined to the merits, and none to defective authentication (Rehearing petition, pp. 3, 37).

In that supplemental brief your petitioner called to the Court's attention the facts that each of the bills was assented to and actually allowed and cited authorities and statutes to the position that that Court should treat the error as harmless and give these bills their intended legal effect by treating them as though the imperfect authentication had been perfected.

The resultant facts and errors are:

1. This decision is in conflict with another Circuit Court of Appeals decision which had established the practice of the Federal Courts years ago.

2. Two important Federal statutes regulating practice are misinterpreted.

(*a*) The trial judge's personal mistake was "harmless error" within U.S. Code, tit. 28, sec. 391.

(*b*) The mistake was amendable within U.S. Code, tit. 28, sec. 777.

The Circuit Court of Appeals not only erroneously interpreted, but misapplied, these statutes.

3. The rule of "judgment term," limiting action after the expiration of the judgment term, was erroneously applied by the Court in deciding that the application of this rule precluded a curing of an error such as here existed.

4. That the case was pending in the Circuit Court of Appeals when the question was first raised does not prevent amendment. That the Court was in error in deciding the contrary.

5. So far as the Circuit Court of Appeals had discretionary power, on the facts of these cases, where the signature of the trial judge was in accordance with recognized custom and where the established practice of the circuit showed a long-continued condonation of that custom, the Circuit Court of Appeals did not use a sound judicial discretion in inflicting on the appellant so severe a penalty for a fault for which it was in no wise blameworthy.

Compare *Barber Asphalt Co.* v. *Standard Co.*, 275 U.S. 372, 386-387.

Relief here is sought under the provisions of the United States Code, tit. 28, sec. 347.

Argument.

I.

THE PREVIOUS PRECEDENT IN FEDERAL PROCEDURE ESTABLISHED A CONTRARY PRACTICE.

It is, of course, difficult to get reported cases from Circuit Courts of Appeals dealing with a situation such as ours as, we believe, most of such cases were so liberally dealt with as to be handled without opinions on such issues. Reported decisions where this issue has arisen are almost nil. The one Circuit Court of Appeals which has dealt with the same principle and in an identical situation is the Eighth Circuit. The case arose in 1924:

> "The first ground of the motion to dismiss rests upon this condition of the bill of exceptions. At the end of the recital of the proceedings at the trial appears the usual form of an approval of the bill of exceptions with the dates blank and the place for the signature of the judge blank, just over the words:
>
> " 'Judge District Court of U. S. Southwestern Division, Western District of Missouri.'
>
> "Also below this appear the words:
>
> " 'The above and foregoing bill of exceptions is hereby approved, Griffin & Orr, Attorneys for Defendant William J. Burns International Detective Agency, Inc. McReynolds and McReynolds and John Flanigan, Attorneys for First National Bank of Sarcoxie, Missouri.
>
> " 'Let the bill be filed and the filing show of record as of this 25th day of February, 1922.
>
> ARBA S. VAN VALKENBURGH, Judge.'
>
> "This condition of the bill of exceptions convinces that counsel for the plaintiff prepared it, and submitted it to the counsel for the defendants; that thereafter

counsel for the plaintiff either presented it or caused it to be presented to the trial judge; that he intended to allow and certify it in the usual form, but by mistake wrote his name in the last blank for his signature, instead of in the blank at the foot of the usual certificate. He would not have ordered the bill of exceptions filed, if his mind had not assented to its approval, and as counsel for the defendants stipulated that the bill of exceptions was correct, the mistake of the judge in the placing of his signature ought not to deprive the plaintiff of the benefit of her writ of error. U. S. Compiled Statutes, §1591. The motion to dismiss the writ of error is therefore denied."

Steen v. *First National Bank,* 298 Fed. 36, 37, 38 (C.C.A. 8).

This case has stood unchallenged as a precedent for the intervening eight years until the decision of our Court. Our case and this cannot be distinguished on principle. We therefore ask that this decision be followed.

II.

LIBERALIZED FEDERAL PRACTICE DOES AWAY WITH SUCH TECHNICALITIES OF PROCEDURE AS WERE HERE APPLIED.

In the administration of justice any system of procedure should aim to make the attainment of a just decision more sure. Even before the days of Jeremy Bentham common sense rebelled against antiquated court procedure which was a pitfall for the unwary and a means of profit for the skillful practitioner.

So slowly have court reforms lagged in this country that we are still behind England, where more than forty years ago Baron Bowen could proudly boast of English procedure:

"Every amendment can be made at all times and all stages in any record, pleading or proceeding that is requisite for the purpose of deciding the real matter in controversy. It may be asserted without fear of contradiction that it is not *possible* in the year 1887 for an honest litigant in her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation."

1 Select Essays in Anglo-American Legal History, 541 (1907), Charles Bowen.

It is in cases like the present that a supreme opportunity is afforded this Court to give realization to those ideals which, although recently expressed in a dissenting opinion, we feel sure express the unanimous sentiment of the whole Court:

"A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity."

Reed v. *Allen*, 52 Sup. Ct. Rep. 532, 537.

Since the time the Federal judiciary system was established in 1789 it has at least been the lawyers' ideal that the administration of justice of the Federal Courts might be freed as far as practical from slavish adherence to precedents which from one cause or another had grown into hard and fast rules of procedure as the law made its slow progress from mediaeval lawyers' refinements to become a working machine for administering practical justice. The very act establishing the Federal judiciary was a first step in this direction in that it—

"emancipated the judicial department of the government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the

administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice."

McDonald v. *State of Nebraska*, 101 Fed. 171, 177. See also *Parks* v. *Turner*, 12 How. 39, 46.

While more or less popular protest continued from the beginning of our American Courts against the technicalities of the law, reforms through legislation have lagged. Spasmodically steps in advance have been incidentally enacted into statutes, such as in the Act of June 1, 1872 (c. 255, sec. 3), but, by and large, the burden of advance and improvement has been upon the judges themselves. Only within the last twenty-five years has popular clamor to some small extent made itself articulate in legislative progress for the elimination of procedural technicalities.

In 1915 Congress passed an act doing away with some still-persisting artificialities of Federal pleadings and procedure. This act not only freely allowed at any stage amendments of pleadings, but permitted a change of form of action from equity to law or from law to equity (U.S. Code, tit. 28, sec. 397); and provided for the interposition of equitable defenses and the granting of equitable relief in actions at law; gave the Appellate Courts full power to render such judgment upon the record as law and justice required without too nice a regard to technicalities (U.S. Code, tit. 28, sec. 398); also permitted to be shown at any stage in the litigation that Federal jurisdiction based on diversity of citizenship existed (U.S. Code, tit. 28, sec. 399).

Act March 3, 1915, c. 90.

In 1919, as another step of progress, Congress passed an additional act further unfettering Federal Appellate Courts

by giving them power to render decisions based on the substantial rights asserted by litigants even though there were procedural defects in presenting them. There was then added to the Judicial Code the provision:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."
>
> St. Feb. 26, 1919, c. 48, now part of U.S. Code, tit. 28, sec. 391.

This as well as all these Federal statutes of similar nature previously enacted were—

> "designed to free the administration of justice in the Federal courts from all subtle, artificial and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits."
>
> *McDonald* v. *Nebraska,* 101 Fed. 171, 176 (C.C.A. 8).

The "defects" and "technical errors" which the last statute eliminates have to do with shortcomings in the technique of the judicial procedure which a litigant must use to assert his substantial rights. The shortcoming here in the form of the judge's signature authenticating agreed-upon bills of exceptions concerns only the method of asserting our rights.

When in ancient practice the Appellate Court had before it the original evidence witnessed by the trial judge as the bill of exceptions it well may have been of importance that

the evidence of the allowance of that bill should have been under the hand and seal of the trial judge, followed by his confession or denial thereof in person before that Court.

Krauss Brothers Lumber Co. v. *Mellon,* 276 U.S. 386, 389.

In modern practice, however, and more recently by statute, the Appellate Court sees only a printed copy of the bill of exceptions, with its authentication, and takes the contents of the bill and the evidence of its allowance solely from the printed transcript "Certified under the hand of the Clerk of the lower court and under the seal thereof."

U.S. Code, tit. 28, sec. 865.

The general rule requiring judicial signature must, therefore, now be for procedural regularity and judicial dignity, and not for any actual utilitarian necessity of standing as a witness to the contents of the bill.

Where this Court in modern practice has enforced with any strictness rules relating to bills of exceptions, it has done so for "substantial" and not "technical" errors.

> "Strict requirements are thus insisted on so as to make certain that the reviewing court shall have before it an accurate account of the evidence or exhibits, which were before the trial court in the original hearing of the issues of the case, properly certified."

Krauss Brothers Lumber Co. v. *Mellon,* 276 U.S. 386, 390.

The case at bar presents no uncertainty as to the record, for the Appellate Court can completely ignore the defective signature and rely on other recitals of the record certified under seal by the clerk of the District Court (R. 226, 263) which show:

> "On the 20th day of August A. D. 1930, the substitute bill of exceptions, motion to amend substitute bill of exceptions and the bill of exceptions concerning the plaintiff's motion for a new trial are allowed" (R. 6).

Record, 7, shows entered on the bill of exceptions:

> "Filed August 8, 1930; amended and allowed August 20, 1930."

To a like effect see R. 226, 238, 239.

This same problem was present in one of our recent Massachusetts cases where a Superior Court judge endorsed with initials only a denial of a motion to vacate judgment. The Appellate Court felt constrained to hold that the initials must be disregarded as a judge's signature, but the official attestation of the clerk of the lower Court to the effect that the motion to vacate judgment had been denied appearing in the record the Appellate Court took official cognizance of the record as a whole.

Fairbanks v. *Beard*, 247 Mass. 8, 9.

It is respectfully submitted that our case shows no "total failure to observe an important regulation in matter of substance" as in *Barber Asphalt Co.* v. *Standard Co.*, 275 U.S. 372, 384.

Under this statute what is incumbent upon an Appellate Court is that the Court be—

> "required, however, by the Act of February 26, 1919 (U. S. C. A. §391) on hearing of an appeal, to give judgment 'after an examination of the entire record before the court, without regard to technical errors, defects or exceptions, which do not affect the substantial rights of the parties' . . . courts exist to do justice; and it would be a reproach to any legal system to deny a litigant relief, to which upon his pleadings and proof he is en-

titled, merely because his counsel have come in by the wrong door of the court."

Clarksburg Trust Co. v. *Commercial Casualty Ins. Co.*, 40 F. (2d) 626, 634 (C.C.A. 4).

The respondent in its prior brief (p. 11) argues that this statute translates "into statutory form" a rule previously recognized by this Court, and nothing more, and cites:

Vicksburg &c. R.R. v. *O'Brien*, 119 U.S. 99, 109 (Brief, p. 11).

The respondent, however, ignores the rule appearing in the majority opinion, at page 103:

> "While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party."

The error of which we complain is that the Circuit Court did not apply this statute in our case. Within the above rule the errors complained of clearly "operate to the substantial injury of the party against whom it was committed."

The case at bar presents an instance of where there was compliance with all requirements, imperfect only in that the judge signed his name informally. The mistake was not that of a litigant, but solely that of the judge (Request of judge, Rehearing petition, p. 42). It was at worst a mere irregularity of form. There is no question but that it was the judge's signature. The fact that he did not write his name in full was an error of the most harmless kind, in no way doing any injustice to the respondent. If ever an error can be "harmless," is not this an extreme instance? If ever a defect is "technical," is not this the most technical of such defects?

III.

THE MISTAKE WAS AMENDABLE.

The amendment asked was only to perfect a partial or imperfect authentication of the bill. It sought only to give effect to the trial judge's act allowing the bill. It neither amends nor disturbs the judgments themselves, nor imports or detracts any substantive item not already in the case.

> "DEFECTS OF FORM; AMENDMENTS.—No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, *in any court* of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."
>
> U.S. Code, tit. 28, sec. 777 (originally section 32 of the Judiciary Act of 1789).

From the beginning this Court announced, and all Federal Courts consistently have followed, that the intended purpose of the statute is remedial, entitled to a most liberal construction and intended to avoid miscarriage of justice through technical faults of form.

> "The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the judiciary act of 1789, c. 20

(now section 954, Rev. St. U. S.) and quite as broadly, to say the least, as it is possessed by any other courts in England or America, and it is upheld upon principles of the soundest protective policy."

Matheson's Adm'rs v. *Grant's Adm'r,* 2 How. 263, 281 (per Story, J.).
Norton v. *Larney,* 266 U.S. 511, 516.
Taylor Co. v. *Anderson,* 275 U.S. 431, 438.

"The discretion of the court to allow amendments is so clearly conferred by section 954 of the Revised Statutes (U. S. Comp. St. 1901, p. 696) that it is unnecessary to cite any of the numerous cases on the subject. When a party gets his cause of action, or his defense, or his appeal, before a court of competent jurisdiction, he should not be turned out before trial of the merits of the controversy, except in obedience to a clear statutory mandate, or on a showing of gross carelessness or bad faith. The absolute dismissal of a plea or an appeal, for error in a matter of mere procedure, is in reality the infliction of the severest penalty for a minor fault, and is suggestive of the excessive punishments formerly inflicted for minor offenses in the administration of the criminal law. Conformity to rules of procedure is important, but usually it may be secured by imposing as a condition of amendment the payment of costs or other penalty, short of dismissal, on the party or his counsel, as circumstances may require, for negligence or inadvertence."

Bedford v. *J. Henry Miller, Inc.,* 212 Fed. 368, 370 (C.C.A. 4).

"Under section 954 of the Revised Statutes the right of amendment extends to the 'summons, writ, declaration, return, judgment, and other proceedings in civil causes in any court of the United States,' and may be

exercised at any stage of the case, even after trial and judgment. The extended and beneficent use made of the authority given by this section to make amendments is disclosed by a long line of decisions of the supreme court of the United States covering every step in a case from the summons to the verdict and judgment."

McDonald v. *Nebraska,* 101 Fed. 171, at 177 (C.C.A. 8).

Under this statute the power of an Appellate Court "in its discretion to allow such amendments—and its duty to do so in appropriate cases, cannot be doubted."

Norton v. *Larney,* 266 U.S. 511, 516.

Allowance of a bill of exceptions is the main element. Signature is the form by which that allowance is evidenced. It is like a writ, issuing from Court, lacking a seal of the Court, or a signature, or wanting some other such element. In such instances Federal Courts have repeatedly declared such defects in writs as lack of a seal, lack of a return day, or lack of the proper signature, lack of the proper test, or the like mere matters of form, capable of amendment.

United States v. *Turner,* 50 Fed. 734.
Cotter v. *Alabama, G. & S. R. Co.,* 61 Fed. 747.
Bryan v. *Ker,* 222 U.S. 107, 112.
Miller v. *Texas,* 153 U.S. 535.
Texas & Pacific Ry. Co. v. *Kirk,* 111 U.S. 486, 487.

Moreover the bill, with its authentication, whether complete or imperfect, is a record of the trial Court (*Pomeroy's Lessee* v. *Bank of Indiana,* 1 Wall. 592, 599), and as such the authentication at least is capable of amendment by that Court. While a record cannot lawfully be amended after the term unless there is official evidence on which to base an amendment, and something to amend, where those two ele-

ments exist the amendment may be had *nunc pro tunc.* This Court has said that even where there is no evidence of official action beyond the judge's recollection of the facts, any entry justified by such recollection may be made *nunc pro tunc.*

In re Wight, 134 U.S. 136.
Michigan Ins. Bank v. *Eldred,* 143 U.S. 293, 299.
In re Plymouth Cordage Co., 135 Fed. 1000, 1003 (C.C.A. 8).
Brown v. *United States,* 196 Fed. 351, 353 (C.C.A. 7).

It is a puzzle just why the Circuit Court of Appeals chose to pick out *Origet* v. *United States* as its precedent. There are six cases from this Court which have touched this subject. The other five, some before and some after *Origet* v. *United States,* we submit recognize that a defective authentication may be amended.

The principle which we urge—that defective authentication is amendable—is illustrated in the decisions of this Court, one of which seems to deny and five to recognize it.

1. *Mussina* v. *Cavazos,* 6 Wall. 355, at 363 (1867):

> "Whatever might be our opinion of the exceptions which appear in the record, if they were presented in such a way that we could consider them, we find them beyond our reach. The bill of exceptions, or what purports to be a bill of exceptions, covering more than three hundred and fifty pages of the printed record, is neither signed nor sealed by the judge who tried the case; and there is nothing which shows that it was submitted to him or in any way received his sanction."

The underlined clause was unnecessary to the decision unless the Court considered the defect amendable had there been anything "which shows that it was submitted to him [the trial judge] or in any way received his sanction."

2. *Blitz* v. *Brown,* 7 Wall. 693, at 694 (1868):

The clerk's certificate to the transcript of record submitted on writ of error was a blank form without seal of court or signature of clerk. Held, there was no authentication whatever, so the Court was without jurisdiction and the writ was dismissed.

3. *Origet* v. *United States,* 125 U.S. 240, 243, 244 (1888):

The bill of exceptions was signed "A. B." The Court held the initials "A. B." not the signature of the judge, not a sufficient authentication, nor sufficient evidence of its allowance by the judge of the Court and refused to consider its contents. There was nothing to show who "A. B." was, or anything to indicate that if properly authenticated the bill of exceptions merited a review, or that any effort had earlier been made to have the mistake corrected. The implication is that the right of amendment was denied.

4. *Idaho & Oregon Land Co.* v. *Bradbury,* 132 U.S. 512, 513 (1899):

This was a case of defective authentication of the transcript of the record. The certificate of the clerk was complete except for signature, which was omitted. Although recognizing the authority of *Blitz* v. *Brown,* the Court here held:

> "The question presented is not one of no authentication, but of irregular or imperfect authentication; not of jurisdiction but of practice. It is, therefore, within the discretion of this court to allow the defect to be supplied. Considering that the motion to dismiss was not made until it was too late to take a new appeal or writ of error, justice requires that the record should be permitted to be withdrawn for the purpose of having the certificate of authentication perfected by adding the signature of the clerk."

This decision overrules the implication in the Origet case.

5. In *Michigan Insurance Bank* v. *Eldred*, 143 U.S. 293, 298, 299, this Court considered specifically the question of amending bills of exception, seasonably filed, after the judgment term, and held:

> "By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end. . . .
>
> "The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court; the trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed. Hanna v. Mass. 122 U.S. 24. Any fault or omission in framing or tendering a bill of exceptions, being the act of the party and not of the court, cannot be amended at a subsequent term, as a misprision of the clerk in recording inaccurately or omitting to record an order of the court might be. In re Wight, 134 U. S. 136."

The entire second paragraph, and especially the last sentence, was unnecessary unless the Court recognized the possibility of amendment after the judgment terms *for "fault or omission . . . of the court."*

6. This Court last dealt with imperfect authentication of a bill of exceptions in *United States (Ex rel. Kinney)* v. *U.S. Fidelity & Guaranty Co.*, 222 U.S. 283, 284:

> "As to the contentions which relate to occurrences at the trial, they cannot be considered, as the record contains no bill of exceptions. The paper in the record styled 'Exceptions to the charge to jury,' initialed 'J. B. McP., trial judge,' and signed by the plaintiff, is not a bill of exceptions (Origet v. United States, 125 U. S. 240, 243), but if it were to be treated as a bill of exceptions as all the matters therein referred to depend for their solution upon an examination of the evidence which is not in the record, it follows that we have no means of determining whether reversible error arose from an action of the court on any of the subjects to which the paper refers. This being the case, it becomes our duty to affirm."

This clause underlined was unnecessary unless the power of amendment existed to be exercised in a meritorious case even after judgment term.

IV.

"JUDGMENT TERM."

Our Circuit Court of Appeals decided that it was too late to send the case back for amendment, as the term at which the judgments had been entered had expired and the District Court had lost jurisdiction (R. 267). We do not question that the general rule is:

> "That the bills of exceptions shall be signed before

the trial court loses jurisdiction of the cause by expiration of the term or such time thereafter as may have been duly prescribed."

Exporters v. *Butterworth-Judson Co.*, 258 U.S. 365, 369.
Walton v. *United States*, 9 Wheat. 651, 657-658.

The statute which requires signature to a bill of exceptions does not include any "judgment term" limitation.

U.S. Code, tit. 28, sec. 776.

That rule orginated in ancient English procedure where the Crown commissioned the judge to hold a particular term of court and where the authority of that judge ceased with the expiration of that term and commission. In this country, however, the powers of Courts and judges "is lodged by the Constitution and is a continuing power," so that the rule here maintains without statutory mandate and only as one of procedure and not of power.

Western Dredging & Importing Co. v. *Heldmaier*, 116 Fed. 179, 181 (C.C.A. 7).

In an early case in answer to the argument that the application for the amendment came too late Judge Story said:

"And first, as to the time of making the amendment. It is said that it should have been either at the term when the order for the arrest of judgment was made, or at the furthest, at the next succeeding May term of the court; and it was too late to make it a whole year afterwards. But there is no time absolutely fixed, within which such an amendment should be moved. All that the court requires is that it should be done within a reasonable time; and when no such change of circumstances shall have occurred as to render it inconvenient or inexpedient. Nothing is more common than motions

to amend the record after a writ of error has been brought; nay, after a writ of error has been argued in the court above, and sometimes even after judgment in the court of error, pending its session."

Matheson's Adm'rs v. *Grant's Adm'r,* 2 How. 263, 281.

At the same time this general rule has been so honored by its breach and so many classes of exceptions have gained recognition that there seems to be little left of the harsh terms of the original rule.

". . . This rule is not without exceptions that there may be circumstances justifying the signing of the bill after the expiration of the term at which trial was had. The rule is not an iron clad rule. It is a rule for the protection of the rights of parties, but is not to be applied with vigor to defeat the ends of justice where the party seeking relief is without fault. . . . But there may be circumstances not resulting from laches of the parties which should avail to relax the rule."

Western Dredging & Importing Co. v. *Heldmaier,* 116 Fed. 179, 182 (C.C.A. 7).

Not only where the circumstances of a particular case have justified it has a bill of exceptions been allowed by a trial judge after the expiration of the judgment term, but even been compelled by mandamus.

Such exceptions have been recognized by this Court—

Under "very extraordinary circumstances":

Muller v. *Ehlers,* 91 U.S. 249, at 251.

Jones v. *Grover & Baker Sewing Machine Co.,* 131 U.S. Appx. cl.

Michigan Insurance Bank v. *Eldred,* 143 U.S. 293, 298.

Where justice requires a suspension of the rule:

United States v. *Breitling,* 20 How. 252, 254.
Dredge v. *Forsyth,* 2 Black, 563, 568.

Under "special circumstances":

Hume v. *Bowie,* 148 U.S. 245, 253.

Where delay is caused by the judge, and assent is given within the term:

Davis v. *Patrick,* 122 U.S. 138, 143.
Waldron v. *Waldron,* 156 U.S. 361, 378.

Where the opponent is estopped from objecting to a late signature:

Chateaugay Ore & Iron Co., Petitioner, 128 U.S. 544, 555.

Where delay is through fault of opponent:

Hunnicutt v. *Peyton,* 102 U.S. 333, 355.

For "sufficient reasons":

Hunnicutt v. *Peyton,* 102 U.S. 333, 355.

Where the judge is away, consent seasonably given:

Taylor v. *United States,* 52 Sup. Ct. Rep. 466.

Where the fault is the Court's:

Michigan Insurance Bank v. *Eldred,* 143 U.S. 293, 299.

In our Circuit Courts of Appeals the following have been held sufficient within the recognized exceptions:

Inability of Court stenographer to transcribe notes on exceptions:

Dalton v. *Gunnison,* 165 Fed. 873 (C.C.A. 9).

Trial judge ill:

Roberts v. *Bennett,* 135 Fed. 748 (C.C.A. 2).
Re Bills of Exceptions, 37 F. (2d) 849, 851 (8) (C.C.A. 6).

Exhibits mislaid without fault of excepting party:

Pittsburgh Gas & Coke Co. v. *Goff-Kirby Coal Co.,* 151 Fed. 466 (C.C.A. 3).

Presented in time, but delay in settling:

Southwest Metals Co. v. *Gomez,* 4 F. (2d) 215, 218 (C.C.A. 9).

Refusal of judge to sign in form submitted:

Scaife v. *Western North Carolina Land Co.,* 87 Fed. 308 (C.C.A. 4).

Delay for convenience of trial judge:

Western Dredging & Improvement Co. v. *Heldmaier,* 116 Fed. 179 (C.C.A. 7).

Oral order only of trial judge at time of directing verdict:

Koewing v. *Wilder,* 126 Fed. 472, 474 (C.C.A. 2).

Delay occasioned by adversary or judge:

Franklin County v. *Furry,* 144 Fed. 663, 664 (C.C.A. 7).

Seasonably stipulated for settlement, but delay caused by judge:

Schmid v. *Standard Steel Car Co.,* 202 Fed. 1023 (C.C.A. 2).

Excepting party not guilty of neglect, bill presented in time, judge refused to sign:

Re Federal Life Insurance Co., 248 Fed. 908 (C.C.A. 7).

Where the parties have done all they can:

Re Bills of Exceptions, 37 F. (2d) 849, 851 (9) (C.C.A. 6).

Some of these cases turn on consent of an opponent given during the term. As jurisdiction is never conferred by consent (*Exporters* v. *Butterworth-Judson Co.*, 258 U.S. 365, 369), it follows that the rule and its exceptions are procedural and not jurisdictional, to be enforced to accomplish, and not to defeat, substantial justice.

Each of our bills contains a prayer for allowance. Each is assented to without limitation. The assent continues until all that is necessary is done to give the bills their intended legal effect and brings them within the "consent" exceptions, *supra*. The other facts of our case bring these bills within the principle of the other exceptions to the rule. They actually and seasonably were allowed (R. 223, 226, 238, 239).

If the defect was so amendable within these exceptions to this general rule, then the amendment was one which the District Court was bound to make, and the Circuit Court of Appeals had both the power and duty to treat the bills as amended and act accordingly.

Norton v. *Larney*, 266 U.S. 511, 516.

V.

APPEAL DOES NOT PREVENT RELIEF.

Treating the case as one where "the District Court has lost jurisdiction of the case" (R. 267) by reason of the judgment term expiration and the appeal, the Circuit Court

of Appeals held that both it and the District Court were without power now to amend or to correct a "harmless error." The fact of an appeal pending in the Circuit Court of Appeals does not prevent any relief otherwise proper.

Barber Asphalt Co. v. *Standard Asphalt & Rubber Co.*, 275 U.S. 372, 386, 387.

VI.

RESPONDENT'S CLAIM OF INSUFFICIENT CERTIFICATE.

Before the Circuit Court of Appeals the respondent made the further claim that the record was technically defective in that "there is no certificate of the judge to the effect that the bill of exceptions contains all material evidence in this cause." The bill specifically states:

> "The following is all the testimony material to the issues presented in this Bill of Exceptions and submitted herewith are copies of all the exhibits in evidence material to these issues and which are not set forth at length or in their material part in the testimony itself" (R. 11).*

The bill with that statement was assented to by this respondent (R. 222) and was allowed by the Court.

The bill of exceptions (R. 11, 121, 123, 207) and what follows each reference, with the stipulation before this Court,* shows a course sufficient to bring this record within the principle of *Clyatt* v. *United States*, 197 U.S. 207, 221, where the Court held: "we are of the opinion that the Bill of Exceptions should be taken as containing all the evidence."

Compare also *Crowe* v. *Trickey*, 204 U.S. 228, 235.
Gunnison v. *Rollins*, 173 U.S. 255, 262.

---

*The copies of the exhibits referred to, bound with the signed stipulation concerning them, was filed with the District Court, transmitted to the Circuit Court of Appeals, and by the clerk of that Court to, and is now before, this Court. (R. 224.)

Even were there any justification for the respondent's contention, it would apply only to assignments of errors Nos. 28 and 29 (R. 252) based on the refusal of the trial Court to direct a verdict for Ohl upon all the evidence. Even were there a failure to report all the evidence, it would not concern the numerous remaining assignments of errors.

United States v. *Copper Queen Mining Co.*, 185 U.S. 495, 497.

Krauss Brothers Lumber Co. v. *Mellon*, 276 U.S. 386, 390.

VII.

A REACTIONARY AND UNWORTHY DECISION.

This decision sounds a century late. It belongs to the period of a hundred years ago, when the prisoners were acquitted because the property stolen was that of Marie Jones and not that of Mary Jones. Decisions like this rankle, and are a blot on the judicial escutcheon. It works an injustice in the case at bar. That is bad enough, but, worse, it establishes a narrow precedent encouraging practitioners to treat the practice of the law as a game to be won by nimble wits manipulating trivialities.

The way a trial judge signs a paper should never be allowed to be decisive of the rights of parties, especially when neither the party nor his counsel can control the judge's form of signature. If the form of the judge's signature be once allowed to be a determining test of litigants' rights, then there is a possibility of a further refinement to determine what should be the standard of the judge's proper signature. Must he sign in the same form in which his commission issues? May he shorten his formal official signature from James Arnold Lowell to James A. Lowell or to J. A. Lowell?

In his request the district judge sets forth that the error in the signature was his, for which counsel for appellant was

in no way responsible (Rehearing petition, p. 42). The course followed was in accordance with the common practice in Massachusetts, condoned by this very Circuit Court of Appeals (Petition, p. 8). If the Court felt these bills were not properly authenticated, it affirmed the judgments "because of the transgression—and this notwithstanding the transgression was largely due to its own course of action." Had it previously in the early days of this practice discountenanced such signatures, the District Court judges and clerks would have changed the practice. Under these circumstances affirming the judgments "was a very severe penalty to impose for action which had the court's implied sanction up to that time." Here the Circuit Court "passed the bounds of a sound discretion in affirming the" judgment "because of the transgression." The fault being the trial judge's personal fault, and not your petitioner's, the Circuit Court of Appeals "should have remitted the transcript to the District Court to the end that a further opportunity might be had to comply with the" rule.

Barber Asphalt Co. v. *Standard Asphalt & Rubber Co.*, 275 U.S. 372, 386, 387.

But even beyond this, such a technicality is unworthy of modern practice of law. The decision itself was unnecessary and undesirable, not merely because it worked an injustice, but as a step backwards in face of the precedents, and the liberalized decisions of this Court. Already the decision has been unfavorably commented on in the official publication of the Massachusetts State Bar Association.

Mass. Law Quarterly, August, 1932, number, page 58.

We therefore respectfully request this Court to hold that in each of these cases the bills of exceptions were duly allowed and sufficiently signed (authenticated), and with the appeals were properly before the Court of Appeals for determination on their merits.

Part Two.

Specification of Assigned Errors Urged.

In this brief we urge the following assigned errors, and indicate where in our brief we discuss them:

Error No.	Record page	Section	Brief page
1	240	B (2)	35
		B (3)	38
2	244	B (4)	40
3	244	C (4)	57
4	244	C (4)	57
7	245	F (3)	81
8	246	F (3)	82
9	246	B (6)	47
11	246	F (3)	82
12	247	F (3)	82
18	249	F (2)	81
19	249	F (1)	80
21	250	C (4)	57
23	251	F (4)	82
24	251	F (1)	80
25	251	F (1)	80
26	251	D (2)	73
27	251	D (2)	73
28	252	D (1)	69
		C (3)	52
29	252	C (3)	52
30	252	D (2)	73
31	252	D (2)	73
32	252	D (1)	69
		D (2)	73
33	253	B (2)	35
34	253	B (4)	40
		B (5) (a)	41
35	254	B (5) (a)	41

Error No.	Record page	Section	Brief page
36	255	B (5) (b)	47
		C (4)	57
37	256	B (6)	47
		C (4)	57
38	256	B (6)	47
39	256	A	33
		C (4)	57
40	257	B (6)	47
41	257	C (4)	57
42	259	C (3)	52
		C (4)	57
43	259	B (1)	34
44	259	C (3)	52
45	260	G (1)	83
46	260	G (1)	83
48	261	E (1)	75
49	261	E (2)	76
50	261	G (2)	84
51	261	G (2)	84
52	261	G (2)	84
53	261	G (2)	84
54	261	I	87
55	261	H	86

Statement of Facts.*

These are two actions at law tried together before a jury. The first was a suit by Ohl to recover on a series of notes given by Smith (R. 2). There was a verdict for the defendant (R. 5).

The second action by Smith against Ohl was upon breach of warranty contained in a written contract of sale of a machine and other property for which the notes were given

* References to the record and exhibits in the printed record are indicated by the page number. References to exhibits appearing in the stipulation, before the Court "as part of the original Record," are indicated by the letter "S," followed by the page number in that stipulation. (R. 224.)

(R. 230). There was a verdict for Smith for $7500 (R. 236).

Ohl was a manufacturer in Newark, New Jersey, of machines for stamping, rolling and cutting sheet metals (R. 145). These power presses or brakes, as they were called, were designed to bend metal (R. 47, 48).

Smith was a manufacturer in Chelsea, Massachusetts, of structural steel and ornamental iron, and wanted the machines in question for the purpose of manufacturing steel stairs (R. 15, 44).

The business between the parties was initiated by Smith getting in touch with a broker and then with Ohl (R. 44). There ensued correspondence which will be discussed more in detail later, but which in general was an offer on Ohl's part to sell Smith one of its power presses according to specifications and blueprints and an acceptance on Smith's part of the offer, but the offer and acceptance specifically contemplated a formal written contract to cover the transaction (R. 47, Ex. 13; R. 17, Ex. B; 18, Ex. C; S. 1, Ex. D). In addition to the machine there were similar negotiations for the purchase of a motor, of accessories and of dies. These negotiations, offer and acceptance were also made each in contemplation of a formal written contract covering the transaction (R. 20, Ex. F; R. 21, Ex. O; S. 34, Ex. 17). As a matter of fact, at a later stage a formal written contract under seal between the parties was executed by both embodying the purchase and sale of the press and of the other items (R. 11, Ex. A).

Ohl built the press in Newark, and when it was ready for transportation to Chelsea, by arrangement, Mr. Smith himself, the president and treasurer of the Smith Company and its master mechanic, Hovasse, came to Newark to examine the press and see it in operation (R. 24). They actually saw it operated, and Hovasse was instructed in the operation of the press, its oiling, setting its dies, etc. (R. 25, 26, 40, 58-59, 69, 70, 126, 149, 150).

After two days of such examinations and observation, Hovasse, at Ohl's request, signed Exhibit RR (R. 60), as follows:

"GEO. A. OHL & Co. Newark, N. J.

February 25th 1926

This is to acknowledge that Mr. Hovasse of A. L. Smith Iron Works of Chelsea, Mass., has tested the 12′ 6″— 103,000 lb. Power Press or Brake and Dies and found everything satisfactory. Re:—order #23557.

CHARLES HOVASSE"

The press, accessories, dies, etc., were shipped to Boston March 2, 1926 (R. 27, 29). Ohl then sent to its Boston lawyer the proposed formal written contract (covering the press, motor, accessories and dies) and the notes which had been agreed upon for Smith's signature (R. 27, 29). Smith raised some point on the form in which Ohl had signed this contract and also asked for an express guaranty on the press (R. 29). That guaranty or warranty was added to the contract by a rider physically attached to it (R. 29, 11, Ex. A). Ohl then corrected its signature to Smith's satisfaction and Smith executed the notes and the contract and delivered them to Ohl's Boston lawyer, Shannon, in Boston (R. 29). This is the contract and express warranty relied upon by Smith as the basis for its suit (R. 230). The contract in full is Exhibit A, printed on page 11 of the record.

The press and dies arrived March 15th (R. 60), and under Hovasse's direction, with the assistance of building movers whom he hired, the press was erected (R. 71).

The press was first operated April 15, 1926 (R. 71). It was Smith's claim that from the very beginning the press proved unsatisfactory in operation (R. 8). It therefore became one of the issues of the case whether the unsatisfactory operation of the press was due to any fault of the press or whether it was due to the manner in which Hovasse had assembled it and to the method of its operation.

A second question arose, assuming that there was a breach of warranty of the press, whether any of the notices given by Smith to Ohl of alleged defects in the machine (R. 9, #9) was sufficient as to contents and was given within a reasonable time after the defects were known, or ought to have been known, in compliance with the requirements of the Massachusetts Sales Act. Admittedly the first complaint was not given until June 25th, more than two months after the press went into operation (R. 9, #9a; R. 30, Ex. CC). That first complaint then was of "trouble as the flywheel bearing and disc get very hot" but claimed no breach of warranty therefor. Ohl replied that it was a simple matter to clean out the flywheel roller bearings and grease the machine—any ordinary mechanic can do so (R. 31, Ex. DD). The complaint then for the time being was allowed to drop. It was admitted that the complaint of June 25th was an error and described a condition which did not exist (R. 74, 80), and the Court ruled the notice was "in error" (R. 83). After receiving Ohl's reply Smith continued to use the machine without any further notice or complaint until almost two months later, August 13, when it refused to make further payments on the then-maturing notes (R. 31, Ex. EE).

Then, four months after it had been using the machine, it made a complaint of defects in the machine in general terms which did not, we again submit, comply with the Massachusetts Sales Act, in advising Ohl in what way the press failed to comply with the contract requirements or in asserting a breach of warranty claim. Other notices were later given which will be discussed in detail in the argument.

Without attempting at this stage to go into the details of the controversy as to the efficiency of the press, it perhaps is enough to say that Smith continued to operate the press and at one stage called in some experts to examine it (R. 93), and in the course of the experiments these experts made

they caused the press to break (R. 94), as we claim through no fault of the press, but because Smith previously and these experts had not then handled the machine properly.

It was Ohl's contention on the evidence presented that the press complied with the contract, and that it was entitled to a verdict on the notes sued upon in its suit, and that it was entitled to a verdict in Smith's suit for breach of contract.

Smith pleaded that there was a total lack, as well as a failure, of consideration in our note suit (R. 3). It also claimed in its suit damages for breach of warranty because the machine failed to equal the guaranty (R. 230).

The jury, under a rather confused and misleading charge (R. 218), found two verdicts in Smith's favor (R. 5, 236), so Ohl could not recover on the notes, and Smith, in its suit for breach of warranty, recovered for the amount which it had already paid Ohl on the notes ($4963, R. 220), plus two items of damages ($2531.75, total, R. 109), aggregating $7500 (R. 236). This produced the absurd result that Smith kept, and still keeps, the machine, motor, accessories and dies without any payment and in addition recovers from Ohl money as damages.

The main questions which are presented on the merits in this controversy are:

1. What was the contract between the parties and its proper interpretation?

2. Was there any breach of this contract?

3. If there was a breach of warranty on the part of Ohl, did Smith comply with the Massachusetts Sales Act so as to be able to enforce a claim for breach of warranty?

4. If Smith could recover for a breach of warranty, what was the correct rule of damages?

In addition to these questions, there arose other questions of pleading and practice, and questions as to certain incidents which arose in the conduct of the trial. These

questions will be separately presented and discussed in our argument.

Argument.

A.

THE EFFECT OF PLEADINGS AND OF SPECIFICATIONS.

Under the Conformity Act (U.S. Code, tit. 27, secs. 724, 725) the trial court was bound to follow the State statutes and practice as interpreted by the Supreme Judicial Court of Massachusetts.

Inasmuch as in each case we relied upon Smith's specifications filed in compliance with Ohl's motion (R. 3, 8, 233), and as throughout the trial Smith was allowed to advance claims outside of, or inconsistent with, its specifications, it becomes of importance at the outset to consider the effect of specifications and the rights of parties thereunder.

Under the Massachusetts statutes a party is bound by his pleadings.

> "Pleadings shall not be evidence on the trial but the allegations therein shall bind the party making them."
>
> Mass. G.L. c. 231, sec. 87.

Specifications under pleadings are authorized by statute (Mass. G.L. c. 231, sec. 70), and are "more than a mere technical statement in a pleading." They are presumed to have been made under client's instructions, and the party specifying is bound by and limited to them.

Clarke v. *Taylor,* 269 Mass. 335, 337.

They have the effect of admissions.

Boston Acid Mfg. Co. v. *Moring,* 15 Gray, 211, 215.

Oscangow v. *Arms Co.,* 103 U.S. 261, 263.

The Aracan, 11 F. (2d) 791 (C.C.A. 2).
United States v. *Southern Dredging Co.*, 251 Fed. 400, 401.
Kansas & A. Railway Co. v. *Morton*, 61 Fed. 814, 816 (C.C.A. 8).

In our cases Smith specified particular defects actually observed, time of observations and dates of notices thereof to Ohl. The Court should have ruled, as requested, that Smith was bound by and limited to items specified (R. 8, 9, 10). Ohl's requests 25, 26, 27 (R. 214) and 62 (R. 217; Assignment 39, R. 256) to that effect should have been given and the exceptions to the refusals so to rule should be sustained.

B.

THE CONTRACT IN ISSUE AND ITS EFFECT.

(1)

THE CONTRACT IS A MASSACHUSETTS CONTRACT.

After Ohl signed the contract in Newark, it was forwarded to Massachusetts, where Smith then signed and delivered it to Ohl's counsel in Boston (R. 27, 29). Thus signed and delivered it is a Massachusetts contract.

Hogue-Kellogg Co. v. *G. L. Webster Co.*, 22 F. (2d) 384.
Wastum v. *Lincoln National Life Ins. Co.*, 12 F. (2d) 422.

And the law of Massachusetts governs.

Federal Surety Co. v. *Minn. Steel & Machine Co.*, 17 F. (2d) 242.
Brace v. *Gauge Kresno Construction Co.*, 36 F. (2d) 661.

Dickey v. *Hurd*, 33 F. (2d) 415, 418.
Bird & Son v. *Guarantee Construction Co.*, 295 Fed. 451, 455.
Cooper v. *Philadelphia Worsted Co.*, 68 N.J. Eq. 622.

The Federal Court must apply the Massachusetts Sales Act and construe the contract in accordance with the decisions of the Supreme Judicial Court of Massachusetts.

Stebbins v. *Riley*, 268 U.S. 137, 146.
Central Union Co. v. *Edwardsville*, 269 U.S. 190, 195.
Savings Bank of Richmond v. *Nat. Bank*, 3 F. (2d) 970, 973, and cases.
U.S. Code, tit. 28, sec. 725.

Ohl's 32d request (R. 214) should have been given (Assignment 43, R. 259), and its exception to the refusal thereof should be sustained.

(2)

THE CONTRACT IN ISSUE IS A FORMAL WRITTEN CONTRACT WITH AN EXPRESS WRITTEN WARRANTY.

Smith claimed under a written contract an implied warranty of suitability for a particular purpose (Mass. G.L. c. 106, sec. 17 (1)) not consistent with the express warranty in the written contract (R. 230; Mass. G.L. c. 106, sec. 17 (6)). It is therefore important to determine what was the contract between the parties and whether or not the written contract declared upon was formal and included all the essentials of a purchase and sale contract.

The evidence was undisputed that Smith obtained quotations of Ohl presses from a Boston broker and got in touch with Ohl (R. 44). On November 9, 1925, Ohl offered to sell

Smith one of its presses, and submitted prices, terms, specifications and blueprints (R. 45, Ex. 13; R. 47, Ex. 14; S. 28-33).

November 24, 1925, Smith placed an order for a machine to be built which contemplated that a formal contract would be made between the Smith Company and Ohl (R. 17, Ex. B). Ohl acknowledged the communication (R. 18, Ex. C; S. 1, Ex. D). The offer, acceptance and acknowledgment each contemplated a formal written contract (R. 47, Ex. 13; R. 17, Ex. B, Ex. C; S. 1, Ex. D).

Before the machine was finished or the formal contract executed Smith requested Ohl to design dies for bending stair treads and risers for the press (R. 19, Ex. F; R. 53, Ex. 16 (a)).

January 19, 1926, Ohl accepted this order, sending Smith an acknowledgment (R. 21, Ex. O; S. 34, Ex. 17). Similarly this offer, acceptance and acknowledgment each contemplated a formal written contract later to be signed (R. 19, Ex. F; R. 21, Ex. O; S. 34, Ex. 17).

When Ohl shipped the presses, accessories, motor and dies to Smith on March 2, 1926 (R. 27, 29) it sent to its Boston lawyer, Mr. Shannon, the proposed formal written contract (covering the press, motor, accessories and dies) and a set of proposed notes for Smith's signature (R. 27, 29). After examining the contract Smith suggested that Ohl's signature to the contract be altered, and also wanted an express "guaranty" to be inserted in the contract (R. 29). That guaranty or warranty was added to the contract by a rider physically attached to it (R. 29, 11, Ex. A). Ohl then re-signed his signature, as requested by Smith. Smith executed the notes and the contract and delivered them to Shannon in Boston (R. 29). This contract, and the express warranty therein contained, is the contract set out in Smith's declaration as the basis of its suit (R. 233) and is Exhibit A (R. 11).

The contract purported to be under seal and was in formal language (R. 11).

Before execution the written warranty was added to, and made part of, the formal contract by physical attachment to the contract (R. 29, 11, Ex. A). It incorporated by reference definite specifications which also were in writing (R. 47-49).

Smith pleaded Exhibit A as the complete written contract between the parties (R. 230, Ex. A, R. 11). It is bound to that position.

Mass. G.L. c. 231, sec. 87.

The rider, part of Exhibit A (R. 11), is an express written warranty.

Mass. G.L. c. 106, sec. 14.

It is so pleaded by Smith (R. 231).

In pleading Smith properly described what he got and relied on as a warranty of capacity of the machine to "*bend*" metal (R. 231). The warranty, referring to the contract "specifications" (R. 11, Ex. A; R. 47, Ex. 14), is thus correctly pleaded.

Conversations, correspondence and negotiations preceding a formal written contract, except so far as the correspondence (specifications) may be expressly incorporated in this formal contract, are not admissible. Requests 10, 11 and 12 under assignment 33 (R. 253) should have been granted.

Seitz v. *Brewers' Refrigerating Co.*, 141 U.S. 510.
DeWitt v. *Berry*, 134 U.S. 306.
McGuire v. *Gerstley*, 204 U.S. 489.
Bast v. *Bank*, 101 U.S. 93, 96.
El Dorado Oil Works Co. v. *Société Com. De L'Oceanie*, 182 Fed. 195 (C.C.A. 9).

Murphy v. *India Tire & Rubber Co.*, 29 F. (2d) 228 (C.C.A. 5).
Dunn v. *Mayo Mills*, 134 Fed. 804 (C.C.A. 3).
Newark v. *Mills*, 35 F. (2d) 110, 113 (C.C.A. 3).
Kilroy v. *Schimmel*, 243 Mass. 263.
Bowditch v. *Slattery*, 263 Mass. 496, 498.

The admission of such conversations, correspondence and negotiations prior to the written contract claimed by Smith to have been breached was error, and our exceptions thereto should be sustained (R. 15-16, Assignment 1; R. 240).

(3)

THERE WAS NO IMPLIED WARRANTY OF SUITABILITY, AND PAROLE EVIDENCE TO PROVE SUCH WAS ERRONEOUSLY ADMITTED.

The contract, written, formal, under seal, and signed by both parties, contained all the essentials of a purchase and sale contract (R. 11-14). It was so intended. It contained no ambiguity or words used in other than their ordinary meaning. There is no suggestion of fraud or mistake. No evidence is admissible to vary or enlarge the terms of such a written formal contract by adding prior or contemporary parole negotiations concerning alleged implied warranty of suitability for a particular purpose.

Williston, Sales, sec. 215.
DeWitt v. *Berry*, 134 U.S. 306, 312.
Barrett Co. v. *Panther Rubber Co.*, 24 F. (2d) 329, 335 (C.C.A. 1).
Union Selling Co. v. *Jones*, 128 Fed. 672 (C.C.A. 8).
Bluegrass Canning Co. v. *Steward*, 175 Fed. 537 (C.C.A. 6).
Davis Calyx Drill Co. v. *Mallory*, 137 Fed. 332 (C.C.A. 8).

Tucker v. *Traylor Engineering & Mfg. Co.*, 48 F. (2d) 783, 785 (C.C.A. 10).
Reynolds v. *General Elec. Co.*, 141 Fed. 551, 556 (C.C.A. 8).
Marmet Coal Co. v. *People's Coal Co.*, 226 F. 646 (C.C.A. 6).
Miami Cycle & Mfg. Co. v. *National Carbon Co.*, 268 Fed. 46 (C.C.A. 6).
Boston Consolidated Gas Co. v. *Folsom*, 237 Mass. 565, 567.
Glachen v. *Bennett*, 226 Mass. 316, 319.
Bennett v. *Thompson*, 235 Mass. 463, 467.

This written contract contained a specific warranty made at Smith's request (R. 29) in the following form:

> "We hereby guarantee that the 12′ 6″—103,000 lb. Power Press has a capacity as stated in our specifications of said Press, namely ⅜″ soft steel on square Dies the female of which measures 3″ across the corners, and that the material and workmanship are of the best" (R. 11).

The capacity of the machine contained in the specifications was:

> "capacity ⅜″ soft steel, one bend at a time, on dies the female of which measures 3″ across the corners" (R. 47).

The negotiations of the parties once reduced to a formal written contract, the law says that the writing contains the entire agreement, and all terms previously negotiated about, which were not written into the contract, are held waived or expressly excluded by their very omission.

Glachen v. *Bennett*, 226 Mass. 316.

Marmet Coal Co. v. *People's Coal Co.*, 226 Fed. at 650 (C.C.A. 6).

Bluegrass Canning Co. v. *Steward*, 175 Fed. at 540 (C.C.A. 6).

Davis Calyx Drill Co. v. *Mallory*, 137 Fed. at 334 (C.C.A. 8), and the other cases just cited.

This rule is one of substantive law. Even though incompetent evidence be admitted during a trial, such evidence does not affect the contract itself or the legal obligations of parties thereunder.

Glachen v. *Bennett*, 226 Mass. at 320.

Pitcairn v. *Philip Hiss Co.*, 125 Fed. 110, 113 (C.C.A. 3).

Smith's evidence of conversations and negotiations prior to the execution of this contract, upon which it bases a claim of an implied warranty of suitability for a particular purpose, was incompetent. Its admission was plainly error and the exceptions thereto should be sustained.

Ohl's exceptions under assignment 1 should be sustained (R. 240, 16, 15, 51).

(4)

THE CONSTRUCTION OF THIS CONTRACT WAS FOR THE COURT.

This contract contained no ambiguous words or phrases or any that Smith claimed had any peculiar or trade meaning. Its construction of the contract was for the Court, and the words used were to be taken in their natural, usual and ordinary sense.

General Motors Corp. v. *Abell*, 292 Fed. 922, 926 (C.C.A. 1).

Goddard v. *Foster*, 17 Wall. 123, 142.

Hamilton v. *Liverpool &c. Ins. Co.*, 136 U.S. 242, 255.

Union State Bank & Trust Co. v. *Northwestern Life Ins. Co.*, 55 F. (2d) 1070 (C.C.A. 5).

Burrows & Kenyon v. *Warren*, 9 F. (2d) 1, 4 (C.C.A. 1).

Pitcairn v. *Philip Hiss Co.*, 125 F. 110, 114 (C.C.A. 3).

Faber v. *Mutual Life Ins. Co.*, 250 Mass. 250, 253, and cases there cited.

Reliable Waste Co. v. *Waterhead Mills*, 238 Mass. 496, 498.

Evidence was immaterial and incompetent as to what Smith understood from the Ohl specifications, and the question under assignment No. 2 should have been excluded (R. 244, 56), and requests 70, 71 and 72 (Assignment 34, R. 253) should have been given. Our exceptions should be sustained.

(5)

THE COURT MISCONSTRUED THE CONTRACT AND MISTAKENLY INCLUDED ADDITIONAL WARRANTIES.

(*a*)

"Bend" v. "Set."

In the express warranty there was a guaranty (R. 11), "as stated in the press specifiations," that the machine had a "capacity 3/8" soft steel one *bend* at a time, on dies the female of which measures 3" across the corners" (R. 47).

Instead of expressing the power of the press in "horse power" or "pounds of pressure per inch," or any other unit of measure, the parties choose to express the capacity which the machine should have by a practical operating test. It should have that power which is required to make one bend in a piece of soft steel 3/8" thick on dies the female of which should measure 3" across the corners.

After the metal is *bent* by applying additional pressure it may be *set* so as to retain the shape into which it had been

bent. It was admitted that it takes greater power to *set* metal than to *bend* it (R. 107, 142, 183; see 139, 142). If the machine had a capacity to bend 3/8" material on a 3" die it could bend and set any metal the bending and setting of which did not require a greater power than that which the bending of the 3/8" material on a 3" die required. The machine might both *bend and set* 3/8" material on a bigger die than 3"; 1/4" material might be also both *bent and set* on a 3" die, etc.

Smith's action was based on the failure of the admitted warranty which he correctly claimed in its pleadings was that the press would *bend* "3/8" soft steel on square dies the female of which measures 3" across the corners," and the breach alleged was that it failed so to do (R. 231). His specifications only claimed a failure of the machine to have this *bending* capacity (R. 8, #3d, 5, 6).

The meaning of the two words to "*bend*" and to "*set*" is quite different. To "*bend*" is "to strain or move something having rigidity out of a straight line—to curve—to bow."

> Webster's New International Dictionary (1930), page 209.

To "*set*" is "to fix firmly; to make fast or permanent or stable, to give an unchanging place, form or condition to."

> Ibid., page 1929.

During the trial Smith changed its position and claimed that the machine was guaranteed to have a *setting* capacity. Over Ohl's objections Smith was allowed to develop his case and present it to the jury as though such *setting* capacity was within the scope of warranty of a *bending* capacity.

> See testimony of Lovasse (R. 79, 82) and experts Townsend (R. 94, 95, 100, 107) and Perkins (R. 112, 116, 117-118).

Ohl claimed the press was built to have the required capacity to *bend,* not to *set* the specified metal, and that it was strong enough to bend ⅜" metal on 3" dies (R. 183). Townsend in 1926 had termed this "set" as "squeeze" (see also R. 95, line 27) and condemned it as an operation in this press (R. 105, Q. 3). Yet Smith's experts, including Townsend, in their computations and testimony ignored the express warranty and proceeded on the basis that *bending* in some way or another included *setting,* without anything in the case on which to rest that claim.

> "If a party seeks to make out that certain words in a contract have a different acceptation from their ordinary sense . . . he must prove it . . . by clear, distinct and irresistible evidence."
>
> See *DeWitt* v. *Berry,* 134 U.S. 306, 314.
> *Tampa Shipbuilding & Eng. Co.* v. *General Const. Co.,* 43 F. (2d) 309, 312 (C.C.A. 5).

The trial judge was in confusion about the whole matter, and finally, confessing that he did not understand the situation, left it to the jury with inadequate instructions.

> "There is a minor question of bending, and the difference between bending and setting. I don't personally get the idea of what you want to set steel for, or bend it rather, without setting it. I don't quite see what that amounts to, but you are the arbiters of that and it is for you to say whether in making these risers and stringers that the iron must not only be bent but must be set. All that is within your province" (R. 219).

> "Thus telling the jury, in effect, that they might go outside the guaranty in the written contract to determine the rights of the parties on oral representations, without subsequently making clear that such representations could in no sense be treated as guaranties, or any

part of the contract, or to aid in construing the contract, left a suggestion of guaranty by oral representations running through the case which was prejudicial error."

Murphy v. *Gifford,* 228 Mich. 287, 298.

These words, in their "natural, usual and ordinary sense," are such that a *bending* capacity cannot be construed as inclusive of a *setting* capacity.

Ohl's requests 13, 14, 15, 70 to 76, 17, under assignment 34 (R. 253), and 16 to 19, under assignment 35 (R. 254), should have been granted. In the charge to the jury it was error for the judge to have refused Ohl's requests 63, 64, 68, 69, assignment 35 (R. 254).

Smith's claim that the contract gave him a warranty of *setting* capacity or any implied warranty of suitability for a particular use based on such *setting* capacity is inconsistent with the express warranty limited to a *bending* capacity (see Declaration, R. 230, Specifications 3 (d), R. 8, and 5, 6, R. 9 and the press Specifications, R. 47). Such a claim is something beyond in degree what the express warranty gave. It is like demanding 75 where an express warranty is limited to 50. It is plainly inconsistent with the express warranty. Where negatived, as here, by the express warranty of capacity, the alleged implied warranty of a greater capacity is not within the terms of the contract as properly construed under the Massachusetts Sales Act.

Mass. G.L. c. 106, sec. 17 (6).

Bird & Son v. *Guarantee Construction Co.,* 295 Fed. 451, 455.

"The express warranty of one or more of the qualities of an article excludes an implied warranty of the same qualities or of other qualities of a similar nature. The exclusion or acceptance in his contract by a purchaser of personal property on a warranty of one

or more qualities raises a conclusive presumption that he did not desire or could not secure, or that the parties thought he should not have the warranty of others of the same character and bars any implied warranty thereto."

Century Elec. Co. v. *Detroit Copper & R.R. Mills*, 264 Fed. 49, 53 (C.C.A. 8).

"And even more decisive upon the facts in this case, is the doctrine that an express warranty in the written agreement excludes an implied warranty concerning the same subject-matter. A guaranty set forth in the contract is the denial of a guaranty by implication. This principle is stated by Mechem as follows:

" 'Where the parties have expressly agreed upon a warranty, the law must, in the absence of fraud or mistake, conclusively presume that they have included in their express agreement whatever of warranty is to prevail between them respecting the matter to which it refers. An express warranty of quality, for example, must therefore exclude an implied warranty of quality.' 2 Mech. on Sales, § 1259; 2 Benj. on Sales § 1002.

" 'An express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use.' De Witt v. Berry, 134 U. S. 312, 10 Sup. Ct. 536, 33 L. Ed. 896.

" 'An express warranty of one of the qualities of a machine or article excludes implied warranties of other qualities of the article of a similar nature.' Reynolds v. General Electric Co., 141 Fed. 551, 73 C. C. A. 23."

Alderson v. *General Electric Co.*, 210 Fed. 775, 781.

DeWitt v. *Berry*, 134 U.S. 306, 312.

See also *Reynolds* v. *General Electric Co.*, 141 Fed. 551.

Smith seeks to bring himself within the decisions that where an intended purchaser makes known to the seller the purpose for which he requires an article and leaves to the seller the making or selection and furnishing of an article which is suitable to accomplish the designated purpose, there is a warranty that the article furnished will be suitable to accomplish that purpose.

Mass. G.L. c. 106, sec. 17 (1).

Such an instance was that of *Bird & Son* v. *Guarantee Construction Co.*, 295 Fed. 451, where the contract between the parties "was not a formal one in writing." Where it had to be gathered from "all correspondence and conversations that relate to the agreement between the parties."

In our case Smith did not merely ask Ohl to construct a machine capable of accomplishing certain results. The evidence shows plainly that Smith had originally seen one of the Ohl presses used in making risers and treads (R. 44) in a Cambridge concern which Smith was employing to make these shapes for it (R. 44). Smith saw one in operation in Brooklyn, New York, before it bought one of Ohl (R. 44).

Before placing the order Ohl had submitted specifications and blueprints (R. 45). These are Exhibit 14 (R. 47, S. 28-33). These had been examined both by Smith, the president and treasurer of the company, and its master mechanic, Hovasse (R. 50), both of whom were familiar with machinery and competent to understand and read specifications and blueprints (R. 52, 69).

In his testimony Smith, who placed the order in behalf of the Smith Company, definitely testified: "I had been studying the blueprints received with the November 9th letter for several months and I wanted the machine built as shown in those blueprints" (R. 52).

Smith contracted to buy from Ohl one of its standard machines as described in those specifications and blueprints.

It did not contract to have a machine selected or built to accomplish specified results irrespective of whether the machine corresponded to the identical article described in the contract. The distinction between two such propositions is the difference between the Bird case and ours, and is clearly pointed out in the discussion by Judge Sanborn in *Davis Calyx Drill Co.* v. *Mallary,* 137 Fed. 332, at 335.

(*b*)

Warranty of Perfection.

The Court further instructed the jury:

> "There is also an implied warranty as it is called that the machine would do perfect work" (R. 218).

There is no express warranty to that effect in the contract. It is not a usual implied warranty. It is not claimed in Smith's pleadings. The first mention of it in these terms or substance is in the judge's charge. Its introduction here not only violates the parole-evidence rule (*supra,* B, 3), but also the express provisions of the Sales Act, excluding inconsistent implied warranties.

Mass. G.L. c. 106, sec. 17 (6).

It introduced a novel warranty of "perfect work" into commercial law. This is plainly error.

Ohl's exceptions to the charge A, B, D, E, F, G, H and L (R. 221-222) should be sustained under assignment 36 (R. 255).

(6)

Claim Based on Insufficient Safety Devices.

Smith was allowed to go to the jury on a claim that the press lacked an efficient safety device. It is to be noted,

first, that Smith's specification makes no reference to a lack of any safety device (R. 8-10), and so precludes that claim (see *supra*, A).

Smith had called in two professors of the Massachusetts Institute of Technology to examine the machine (R. 93). In the course of their experimenting with the machine they caused it to break (R. 94). They submitted a report in writing in regard to the machine (R. 102). This report was to the effect that, while the press had a reasonable factor of safety, the break was caused through an *excessive* load in the operation of the press, the closing of the dies having been slightly in excess of *proper* clearance for the thickness of the metal to be bent (R. 105). They went on to report that the machine had no *efficient* safety device to operate when the machine was overloaded. In their opinion this was the most serious indictment against the *design* and construction of the machine; that friction clutches which were the safety devices which the press had (see R. 147, 148, 151, 155, 157, 169, 198) were undesirable (R. 105, 106).

Such a device is one to function when a machine, through accident or operator's negligence, is operated *beyond* its normal capacity, and has to do with the "design" of the press, not with the workmanship or materials used in the press, nor with the capacity itself. Townsend, the expert, so regarded it (R. 97, 105, Ex. 20). The contract specifying no particular type of safety device to the exclusion of another is like buying an automobile without specifying whether the brakes are to be mechanical or hydraulic. If a buyer contracts for an automobile—capacity 5-passenger, 70-horse-power, "material and workmanship . . . of the best"—and receives a 5-passenger 70-horse-power automobile with 4-wheel mechanical brakes, that buyer cannot claim he was entitled to one with hydraulic brakes and therefore an improper delivery has been made. The type of safety device, like the type of brakes, is a matter of design, and not of material, workmanship or capacity.

This claim of a particular type of safety device was not within the terms of the contract or its express warranty.

Smith and Hovasse inspected the press in Newark before shipment (R. 24, 25), and Smith had seen one in operation in Brooklyn (R. 45). The lack of the claimed safety device was apparent to a non-expert on inspection, as appears in the testimony of another of Smith's expert witnesses, Perkins (R. 112, 119).

There was no implied warranty that Smith was entitled to any safety device different from that which the press as designed actually had.

> "If the buyer has examined the goods there is no implied warranty as regards defects which such examination ought to have revealed."

Mass. G.L. c. 106, sec. 17 (3).
Rosenbush v. *Learned,* 242 Mass. 297, 301.
Cudahy Packing Co. v. *Narzisenfeld,* 3 F. (2d) 567, 570 (C.C.A. 2), and cases.
Barnard v. *Kellog,* 10 Wall. 383, 388.
W. & S. Job Co., Inc., v. *Heidritter Lumber Co.,* 255 Fed. 311 (C.C.A. 2).

The charge of the judge to the jury on this issue was wholly inadequate, misleading and erroneous.

> "Also, there is a disputed question whether a safety device of some kind was necessary and whether this clutch amounted to a safety device in that it would slip if it was properly adjusted. Those are the questions of fact, gentlemen, in which you are the final judges" (R. 219).

Ohl's exception to the admission of testimony on this point under assignment 9 (R. 246, 96) should be sustained. Ohl's requests 21, 22, 23, 23-a, 24, under assignment 37 (R. 256) should have been granted, its exception J to the charge (R.

222, 219) should be sustained under assignment 38 (R. 256), and its requests 65, 66 and 67 (Assignment 40, R. 257) should have been given.

C.

NOTICE REQUIRED UNDER THE MASSACHUSETTS SALES ACT.

(1)

THE LAW APPLICABLE.

Although this contract uses lease language, it is a conditional sale, and the Massachusetts Sales Act applies.

Williston, Sales (2d ed.), sec. 7.
Mass. G.L. c. 106, sec. 3, (3).
Penser v. *Marsh*, 218 N.Y. 505.
In re Seward Dredging Co., 242 Fed. 225, 227 (C.C.A. 2).
Peoples Electric Railway v. *McKeen Motor Car Co.*, 214 Fed. 73 (C.C.A. 8).
Hurnanen v. *Nicksa*, 228 Mass. 346, 349, and cases.
Russell v. *Martin*, 232 Mass. 379, 382.
Gottsman v. *Jeffrey*, 268 Mass. 10, 12, 13.

(2)

MASSACHUSETTS SALES ACT REQUIREMENT.

The Massachusetts Sales Act provides:

> "But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise, or warranty, within a reasonable time after the buyer *knows* or ought to have known of such breach, the seller shall not be liable therefor."

Mass. G.L. c. 106, sec. 38.

The Sales Act of New Jersey has practically the same provision.

N.J. Comp. Stat. 1910, p. 4658.

A buyer's acceptance of the goods may not discharge the seller's liability in damages for breach of warranty, but the buyer's failure to give that seller notice of that breach of warranty within a reasonable time *after he knew* or *should have known of the breach* precludes the buyer's rights in recoupment or in an independent suit for a breach of warranty.

2 Williston, Sales (2d ed.), 1259, 1260.
Moore v. *Foss*, 18 F. (2d) 635 (Mass.).
Trimount Lumber Co. v. *Murdough*, 229 Mass. 254.
Skillings v. *Collins*, 224 Mass. 275.

It is not only what the buyer actually knew or ought to have known but also what it is held he could have found out by reasonable test or inspection.

Chess & Wymond Co. v. *LaCrosse Box Co.*, 173 Wisc. 382, 387.
Murphy v. *Gifford*, 228 Mich. 287, 296-297.
Moore v. *Foss & Co.*, 18 F. (2d) 635, 638 (C.C.A. 1).
Lowenberg Co. v. *Block*, 140 N.Y. S. 375.
Glenmore Woolen Mills v. *Goldberg*, 186 N.Y. S. 580.

"Prompt exercise of opportunity for inspection is therefore essential."

2 Williston, Sales (2d ed.), 1261, sec. 484 *a*.
Wright v. *General Carbonic Co.*, 271 Pa. 331.

(3)

WHAT THE NOTICE MUST CONTAIN.

To determine what the required notice from the buyer to the seller must contain, it may be well to ascertain the purpose of the notice. Strangely enough, there has been no authoritative consensus of opinion on this subject, and most decisions have assumed its necessity without discussion. Such a provision does not exist in the English Sales Act. It is a new commercial element in our Uniform Sales Acts and not a codification of general commercial law. Although Courts have not all explained its origin in the same way, yet, logically, business fair dealings between parties would seem to require that if the buyer has any fault to find he should report it promptly when the justice of the claim can be adequately investigated equally by both and, if reparable, unnecessary loss avoided. He should not wait until the seller has no reasonable opportunity to protect himself. Courts have given the following reasons for this rule as a basis for its interpretation.

Its purpose is to prevent the buyer from retaining the goods and using them without giving notice.

> *Regina Co.* v. *Gately Furniture Co.*, 154 N.Y. S. 888.

Quoting an early Wisconsin decision (*Boothby* v. *Scales*, 27 Wisc. 626, 638), the Arizona Court explains the reason for the requirement:

> "A buyer must promptly notify the seller of a breach of guaranty, so that seller will not be deprived of the use of his money or required to pay interest to the buyer and will not be deprived of opportunities for resale."

> *Pratt-Gilbert Co.* v. *Hildreth*, 24 Ariz. 141.

"A notice of rescission must be clear and unambiguous, conveying an unquestionable purpose to terminate the contract."

Tinius Olsen Test. Mach. Co. v. *Wolf Co.*, 297 Pa. 153, 158.

Its purpose is to give the seller an early notice of the alleged defects.

Maggioros v. *Edson*, 143 N.Y. S. 377.

Its purpose is to enable the seller to take such steps as may be necessary in the protection of his rights.

Tegin v. *Chapin*, 176 Wisc. 410, 416.

"The purpose of the provision requiring such a notice is clearly to give the seller timely information that the buyer proposes to look to him for damages for the breach, that the former may govern his conduct accordingly. Such notice need take no special form, but it must be such as fairly to appraise the seller of that intention."

Truslow & Fulle, Inc., v. *Diamond Bottling Corp.*, 112 Conn. at 187.

While the Circuit Court of Appeals for the Second Circuit says:

"The notice 'of a breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages,

as to which, rightly or wrongly, the law requires that he shall have early warning."

Am. Mfg. Co. v. *U.S. Shipping Board E. F. Corp.*, 7 F. (2d) 565, 566 (C.C.A. 2).

At any rate, all the decisions agree that compliance with this statutory requirement of notice is an absolute condition precedent to the buyer's right to recover for a breach of warranty either in recoupment or by independent action. The minimum requirements for the contents of such a notice must logically be a statement which shall advise the seller of:

1. The alleged defects.
2. Repel the inference of waiver.
3. A claim against the seller.

Moore v. *Foss*, 18 F. (2d) 635.
Nashua River Paper Co. v. *Lindsay*, 249 Mass. 365, 370.
Wildman Mfg. Co. v. *Davenport*, 147 Tenn. 551.
Tinius Olsen Test. Mach. Co. v. *Wolf Co.*, 297 Pa. 153.
Bodek & Son v. *Avrach*, 297 Pa. 225, 229.
See also *Bloch* v. *Eastern Machine Screw Corp.*, 281 Fed. 777 (C.C.A. 8).

"Without attempting to lay down a general rule of construction as to the substance of the notice of the breach of warranty which the buyer must give, after acceptance of the goods, in order to hold the seller liable, it seems clear that it must refer to particular sales, so far as that is practicable; that it must at least fairly advise the seller of the alleged defects, and that it must be such as to repel the inference of waiver. Although it need not necessarily take the form of an express claim for damages or threat of such, it ought

to be reasonably inferable therefrom that the buyer is asserting a violation of his legal rights."

Nashua River Paper Co. v. *Lindsay*, 249 Mass. 365, 370.

"For another reason the notice did not meet the requirements of the statute. The telephone conversation of July was not a notice that the blankets delivered were not in accordance with the contract. The only thing plaintiffs did was to ask defendants to go and look at the blankets. There was no assertion that there was anything wrong with them, or if it was it failed to state any particulars. Neither does the letter of August 1st state in what respect there was a failure to deliver in accordance with the contract. That letter merely informs defendants that plaintiffs propose to bring suit for breach of contract, without stating the nature of the breach."

Bodek & Son v. *Avrach*, 297 Pa. at 229.

In view of the general ruling of the judge about the notice, we say that Ohl's requests 35, 38, 50, 51 and 57 (Assignment 44, R. 259-260) should have been given.

Where the facts are not in dispute, the adequacy of the notice and of the reasonableness of the time of such notice are questions of law for the Court.

Schloss Bros. & Co. v. *Charles Stern Co.*, 36 F. (2d) 628, at 631.

Marmet Coal Co. v. *Peoples Coal Co.*, 226 Fed. 646, 651.

International Agriculture Corp. v. *Stadler*, 212 Fed. 378, 381, and cases cited.

Lincoln v. *Croll*, 248 Mass. 232, 233.

American Steam Gauge &c. Co. v. *Mechanics &c. Co.*, 214 Mass. 299, 301.

Tinius Olsen Test. Mach. Co. v. *Wolf Co.*, 297 Pa. 153.

Wildman Mfg. Co. v. *Davenport &c.*, 147 Tenn. 551, at 560, and cases cited.

See also *First National Bank* v. *Pipe &c. Co.*, 273 Fed. 105, 106 (6) (C.C.A. 2), and—

> "The facts being undisputed, the reasonableness of the notice with respect to time was a question of law for the court, and was properly withdrawn from the consideration of the jury."

Earnshaw v. *United States*, 146 U.S. 60, at 67, and cases cited.

American Steam Gauge &c. Co. v. *Mechanics &c. Co.*, 214 Mass. 299, 301.

This is on the same principle established by this Court that—

> "when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding"—

it is the duty of the judge to direct a verdict.

Baltimore & Ohio R.R. Co. v. *Groeger*, 266 U.S. 521, 524.

While the judge correctly ruled that here these questions were questions of law for the Court, he incorrectly ruled that as a matter of law Smith complied with the statute (R. 218). We now propose to show that in this latter ruling he was in error, and that none of the notices given satisfied the statute, and that Ohl's requests under assignments 41 (R. 257) and 44 (R. 259) should have been given; that Ohl's exception under assignment 42 (R. 259) should be sustained; and that verdicts in each case should have been directed for Ohl (Assignments 28, 29, R. 252, 211).

(4)

NOTICES GIVEN.

All the notices except one relied upon were in writing, so there was no dispute as to what or when notices were given (Smith's specifications R. 9, #9, R. 10, #10, 11).

Time When Defects were First Known.

BY SMITH'S OWN DECLARATION AND SPECIFICATIONS AND THE TESTIMONY OFFERED BY IT ALL DEFECTS COMPLAINED OF WERE NOTICED FROM THE BEGINNING OF OPERATIONS OF THE MACHINE ON APRIL 15, 1926 (R. 231, last par.; R. 8, #2, 3; R. 56).

To test, therefore, whether the notices relied upon fulfilled the statutory requirements, let us see, first, what were the defects in the machine which Smith claimed breached the warranty, and secondly, what notices of them it gave Ohl and when the same were given.

What the Trouble Really Was.

There was a good deal of controverted testimony from both sides as to Smith's trouble with the machine and its causes. Ohl claimed that the trouble was caused by Smith's failure to assemble and to maintain the machine properly in his plant and to operate it with the required skill. The testimony on this subject was supplemented by evidence of experts.

After Smith had set up the machine in Chelsea, the first time the press was operated, on April 15th, the bronze bushing in the housing connected with the flywheel shaft turned in the housing so that the press could not be operated (R. 61, 72, 80). Smith continued to use the press without complaint until June 25th, when it submitted a complaint of "trouble as the flywheel bearing and disc get very hot" (R. 9, #9*a*; R. 30, Ex. CC). This complaint did not correctly

describe the trouble, as it was the flywheel shaft bearing that was involved in the trouble (R. 74, 80, 82), and not the flywheel bearing, as Ohl understood from Smith's notice (R. 92, Ex. KKK; R. 33, Ex. FF). Ohl replied that it was a simple matter to clean out the flywheel roller bearings and grease the machine—any ordinary mechanic can do so (R. 31, Ex. DD). The complaints then for the time being were dropped.

Smith claimed that the heating trouble continued, the bearings became hot (R. 55, 85, 88, 89, 108) and trouble was indicated from the beginning in April (R. 72-73, 87); that the press was repaired (R. 72), but the use of it continued uninterruptedly.

After three months' operation (July 12th) Smith determined to see if it could use the press for punching holes as well as bending metal (R. 49), and consulted Professor Norton of the Department of Mechanical Engineering of Harvard, to work out some plan for a gang punch (R. 98, Ex. 19).

August 13th Smith refused further payment and claimed the press did not render satisfactory service (R. 31, Ex. EE). The notice did not advise Ohl in what way the press did not comply with the contract, and did not mention any of the complaints now complained of by Smith in its specifications (R. 8) or in its testimony.

August 16th Ohl sent to his Boston attorney, Shannon, Smith's letters and instructed him to have a first-class mechanic examine the flywheel bearing, the one mistakenly complained of by Smith (R. 92, Ex. KKK). Shannon had the Boston Engineering Company call on Smith (R. 91, 92). Its men took down the clutch assembly for examination and noticed brass and oil in it and an accumulation of paste of oil and dust and brass filings (R. 84). In doing this they broke a part called the brake pulley, through removing it improperly (R. 76). They later brought it back to Smith, and Hovasse repaired the assembly (R. 76).

August 23d (R. 10, #9c) Smith complained that "the principal difficulty" was that the press "will not bend 3/8" metal without a material deflection so that when we do succeed in bending a given piece of 3/8" it requires a lot of man power after each operation to recover the metal from deflection" (R. 35, Ex. II). The notice specifies 3/8" metal as that about which complaint was made, although in fact no 3/8" metal had been used in that press since Ohl bent 3/8" metal as a test in Hovasse's presence in Newark before the machine was shipped (R. 65, 79, 88). This was the first notice by Smith of any "bowing."

The material on which these machines work is not uniform, variations existing among sheets of the same lot and gauge, as well as in different parts of the same sheet. The variations are in thickness and in comparative hardness and softness, elasticity, tensity or springiness (R. 57-58, 68, 79, 110, 129, 143, 144, 152). Such variance in the material was admitted to be a factor in producing lack of uniformity in the product bent. This is referred to in this case as "bowing" (R. 9, #6; R. 15, 63, 65, 103, 143, 152). This admitted variance in commercial soft steel is important in connection with Smith's claim that the press was defective because its products bowed (R. 8, #3*d*; R. 9, #5, 6; R. 10, #11*b*).

This "bowing" also had been observed by Smith "from the very beginning" (see *infra*, "The Third Alleged Notice," (*a*), p. 65).

To obviate the bowing in Smith's product Hovasse attempted experiments (R. 76-77). He put wedges under the bed of the press and ran babbitt metal under its bed (R. 77). Before he did so there had been a clearance between the bed of the press and its foundation (R. 77), as called for by Ohl's plans and specifications (R. 83). This clearance, in a proper operation of the press, should be kept clear (R. 89) as an additional safety factor in case the machine was not properly operated or adjusted (R. 148, 151, 155). When it was found that this idea of Hovasse did

not work (R. 76), Professors Swett and Townsend, from Technology, were called in. They went over the plant and examined the press and saw a piece of ⅛" stock bent which showed a decided bow (R. 93).

On October 15th they returned to take measurements, and, while experimenting with the press, broke the left stanchion of the press (R. 94), and on November 22d made a written report covering their observations (R. 102, Ex. 20). In this report these gentlemen, acting as disinterested experts, reported first that on short lengths of light material there was a lack of alignment or bowing though not of sufficient magnitude to interfere seriously (R. 103-104). On heavy material, and with long lengths of all thicknesses, the bowing required straightening (R. 104). This bowing, these professors considered, was caused principally by a "poorly designed and weak die" (R. 104, 105-106) and through excessive movement of the bed with respect to the floor caused by "ill-advised arrangement of the heavy bedding under the center of the bed" (R. 106). This last referred to Hovasse's experiment (R. 77).

They reported the press had a reasonable factor of safety; that the break in the end frame, or stanchion, or housing, was caused through an *excessive* load in operation of the press, the closing of the dies having been slightly in excess of proper clearance for the thickness of the stock to be bent; that the machine had no *efficient* safety device to operate when the machine was overloaded, which in their opinion was the most serious indictment against the *design* and construction of the machine; that friction clutches as safety devices were undesirable (R. 105). They recommended that the broken stanchion be repaired by welding (R. 102, 106).

While Professor Swett, as one of the experts, adhered to this report, the other expert, Mr. Townsend, the instructor under Professor Swett (R. 125), was retained by Smith as

an expert witness to make further studies, and later repudiated all of this report that was favorable to Ohl (R. 94-95, 100).

Smith then had repaired the broken stanchion by use of steel yokes and 3″ bolts by November 25, 1926 (R. 109). In December of 1926 Smith repaired the hammer-adjusting clutch (R. 64), which he alleged had given trouble from the beginning (R. 8, #3c; R. 87). After those repairs it gave no further trouble. During the whole period Smith kept and used the machine (R. 68, 87) without visible difficulty (R. 139) and with no trouble with the products except bowing (R. 81, 87).

Townsend, as Smith's expert, claimed that the press broke because it did not have sufficient capacity, and did not have a sufficient factor of safety (R. 94, 107, 110, 111, 120).

At no time was the machine tested on such a 3″ die as was described in the specifications and warranty, although it had been tested on 2¼″ die (R. 100, 116). It was uncontroverted that bending metal with a 3″ die was a different proposition than doing it with a 2¼″ die (R. 91, 100, 138, 140). It takes nearly double the pressure to bend on a 2¼″ die than on a 3″ die (R. 150).

Smith offered testimony that the press could not BEND and SET ⅜″ metal. It was admitted that it took greater force to SET the metal than to BEND it (R. 107, 82, 183; see 138-139, 142). Ohl claimed that it had the capacity to BEND ⅜″ metal required by the contract.

Turning now to its notices. Smith now claims on seven occasions it gave notices to Ohl.

The First Alleged Notice.

The first notice of June 25, 1926, was clearly of no effect (R. 9, #9, Ex. CC, R. 30). It was admittedly a mistake (R. 74, 80, 82). The Court so ruled (R. 83).

It complained that "the fly wheel bearings and disc got very hot" (Ex. CC, R. 30).

> "XQ. 63—Now is it a fact that the fly wheel bearings and disc were giving trouble at that time? A. That is a mistake, an error.
>
> "XQ. 66—There was no basis for any complaint about the heating or getting very hot, of the fly wheel bearings and disc? A. That is right."
>
> Cross-examination of Hovasse, Smith's master mechanic (R. 74).

But even were it based on facts, it was wholly lacking in all that such a notice should contain. By no stretch of construction can this letter be read as a claim of breach of warranty.

Ohl's requests 36, 37, assignment 44 (R. 259), as well as his requests 25, 26, 27, and 62, assignment 39 (R. 256), should have been given.

As to this notice the Court, after the witness three times admitted that the letter was in error (R. 74, 80, and 82), subject to Ohl's exception, admitted testimony to show that Ohl must have understood the actual defect intended to have been reported in the letter (R. 83). Then, in Ohl's cross-examination of this witness, the Court refused to permit identification of the location of the complaint involved on the ground that the notice was in error (R. 83). To meet the evidence admitted under the first ruling Mr. Ohl was asked concerning his understanding of the letter and the question was excluded (R. 150). This notice was one within the Court's ruling that as a matter of law notice was given within a reasonable time (R. 218, Assignment 42, 259, 222 C).

Ohl's exceptions to the admission of the testimony on Record 82 and to the exclusion of testimony on Record 83 and

150, under assignments 3, 4 (R. 244) and 21 (R. 250), should be sustained.

The Second Alleged Notice.

This was dated August 13, 1926 (R. 9, #9B, R. 31, Ex. EE). This was one hundred and twenty days—practically four months—after the press had been in operation in Smith's shop and these troubles actually observed.

See Smith's Specifications, R. 8.

This notice complained that the press "cannot accomplish what the specifications call for."

While the law does not undertake to prescribe by days specific limits within which a notice is within a reasonable time, reasonableness being always a question of degree, yet there are certain lapses of time which no one would dispute as falling beyond the limit of "reasonable."

A buyer in Chelsea, his seller in Newark, New Jersey, with telephone, telegraph, and mail service available, can have no excuse for not notifying the seller within a few days of his actual experience of observed defects. Nor can he have any excuse for continuing without complaint his use of the press for practically four months while continually experiencing trouble.

The previous complaint of June 25th had been promptly answered within three days of its being written, and while Ohl's answer treated the complaint as trivial, it made definite suggestions for improvement (Ex. DD, R. 31). When more than forty-seven days were allowed to elapse without any further word, Ohl had a right to believe the trouble was eliminated.

Courts have decided as a matter of law that less, or at least no greater, delay was fatal to the buyer's rights under the statute.

23 days—*Kauffman* v. *Levy,* 169 N.Y. S. 454, 455.

26 days—*Silverman* v. *Engel*, 211 N.Y. S. 584.
[1]27 days—*Lincoln* v. *Croll*, 248 Mass. at 237.
57 days—*Tegin* v. *Chapin*, 176 Wis. 410, 416.
[2]31 days—*Tinius Olsen Test. Mach. Co.* v. *Wolf Co.*, 297 Pa. 153.
3½ mos.—*Bodek & Son* v. *Avrach*, 297 Pa. 225.
4 mos.—*Am. Mfg. Co.* v. *U.S. Shipping Board E. F. Corp.*, 7 F. (2d) 565, 566 (C.C.A. 2).

The cases upon which our opponent relies concern instances relating to a period of time within which it is held that a buyer could or could not have learned the facts requiring a notice, and not to what is a reasonable delay after actual knowledge. Here the delay concerns notice after actual knowledge, and under Massachusetts law, holding a 27-day delay unreasonable (*Lincoln* v. *Croll*, 248 Mass. at 237), bars Smith's recovery either in recoupment or independent action.

In the next place, the notice itself is deficient. It simply complains "it cannot accomplish what the specifications call for," that there were "deficiencies of the press" (R. 32).

Requests 28, 29, 30, 33, 34, 39 to 49, 52 to 55, 58 to 60, under assignment 41 (R. 257), should have been given, and Ohl's exception C to the charge (R. 222)—"A notice was given within a reasonable time" (R. 218)—should, under assignment 42 (R. 259), be sustained.

---

[1] "The delivery of these cones at the New York warehouse of the plaintiffs, through the congestion of traffic was delayed until January 7, 1920. The plaintiffs on February 13, 1920, in a letter gave notice to the defendant for the first time that the 'yarn did not fulfill the specifications of our contract' and asked to be reimbursed for the loss. It is too plain for serious discussion, having regard to the situation of the plaintiffs, and in the light of all the circumstances, that the delay of the plaintiffs in giving notice to the defendant was entirely without business or legal excuse and was as matter of law a bar to the action."

[2] "When plaintiff's engineer demonstrated the machine on August 31, 1926, defendant then knew that this warranty had failed, and the machine would not indicate the amount of unbalance without calculation and use of a chart. It waited a month before giving notice. The lower court held this was an unreasonable time, and we concur in its conclusion. If defendant wanted to rescind, it should have acted promptly. The vendor was entitled to this knowledge, as a matter of business, and the breach was one that was immediately discoverable" (at 158).

A general letter of criticism is insufficient notice. The letter here falls very short of advising the seller of the alleged defects, which is under our law the minimum requirement for the notice required under sec. 38 of our Sales Act.

Nashua River Paper Co. v. *Lindsay,* 249 Mass. at 370.

Wildman Mfg. Co. v. *Davenport,* 147 Tenn. at 560.

See also *Bloch* v. *Eastern Machine Screw Corp.,* 281 Fed. 777 (C.C.A. 6).

Requests 35 and 38, assignment 44 (R. 259), should have been given.

The Third Alleged Notice.

Ex. I I (R. 35), of August 23, 1926 (R. 9, #9c), refers to two difficulties—bowing and the clutch.

(*a*) *Bowing.* This notice claims "the chief difficulty" is that the machine will not bend ⅜" metal without a material deflection (R. 35, 36).

Hovasse, the master mechanic, and Carron, the operator, of this press say that up to this date no attempt had been made to bend any ⅜" material (R. 65, 79, 88). The widest die used was 2¼" to bend ¼" metal (R. 54, and Ex. 18, 80).

Hovasse in February at Newark had a piece of ¼" stock bent on this press. It came from the press bowed (R. 69, 82). From April 15th on Smith had every opportunity to test this press in all desired ways. If, as Smith claims, the press should have had capacity to set as well as bend this metal without bowing, and it did not have that capacity, then Smith knew of the bowing defect in the February product. Directly after the press was ready on April 15th, with every opportunity for experimentation, it was Smith's duty to test its capacity to bend metal. Such tests would have disclosed whether or not it did have the required capacity.

The time for giving the buyer's notice does not commence only when the buyer "knows" of the defect, but when he "*ought to know*" of it. As a reasonable man, put on his guard by notice, he should in the way of ordinary business perform such tests, make such experiments, and do such things as early as his opportunity offered and when business vigilance required.

As we have already pointed out, the buyer is both required to inspect and test promptly and is held to have immediate knowledge of all that such inspection and tests would reasonably disclose.

Smith had been using this press since April 15th (R. 8, #2; R. 54, 61, 71, 84), making risers and treads (R. 54, 88). In bending these 6′ risers the bowing or deflection was especially noticeable when bent in the center of the press, but not so much so when bent at the end of the machine (R. 63). This bowing refers to the product of the machine (R. 15, 63).

THIS ALLEGED DEFECT WAS ADMITTEDLY OBSERVED FROM THE BEGINNING OF OPERATIONS ON APRIL 15TH (R. 8, #2, #3d; R. 9, #5, 6).

This notice was SIX MONTHS after the first bowing in products from this press was observed in Newark and over FOUR MONTHS after Smith had been experiencing such bowing in its own operation of the press.

As to the bowing defect, the notice was not within the time requirements of the statute.

(*b*) This letter also refers to "What is known as the clutch which was removed by some men that you sent to our factory the other day." In Ohl's opinion here was the only difficulty (R. 35). On June 25th Smith wrote Ohl (Ex. CC, R. 30). Ohl answered on June 28th (Ex. DD, R. 31). Smith delayed any further communication until August 13th (Ex. EE, R. 31). Ohl then had been notified only that "the fly-

wheel bearing and disk get very hot," and on August 16th answered Smith's August 13th letter on that basis (R. 33, Ex. FF). On the same day he wrote his Boston counsel, Mr. Shannon, sending him copies of these four letters (R. 92, Ex. KKK), asking for certain investigation as to this "fly-wheel bearing." Shannon called on the Boston Engineering Company to make that investigation. They did, and in doing so took down "the clutch assembly" (R. 83). It was this part of the press where trouble started on April 15th, when the 16" bearing turned in the shaft, the press kept heating up, and the flywheel bearing was shooting brass (R. 61, 76, 72, 84, 85, 87). With all this trouble observed on April 15th a notice of it four months later, in August, could not be ruled as a matter of law a sufficient notice (R. 35, Ex. I I) given within a reasonable time.

The Fourth Alleged Notice.

Smith's August 25th letter (Ex. JJ, R. 37) is specified as the fourth notice (R. 9, #9d). It specifies the 16" bushing "a poor loose fit" (R. 37). Hovasse, who wrote the letter, testified this bearing in which the clutch assembly shaft revolves was the 16" bearing which turned in the housing (R. 61) on April 15th and gave continued trouble after that (R. 62, 73, 86, 88, 89) until Smith repaired it the following September (R. 76, 86). So this notice also was more than four months after the actual trouble was observed, concerned only a minor item and was repaired and eliminated from the case by being repaired a few days after this letter.

The Fifth and Sixth Alleged Notices.

Smith specifies the fifth notice was on September 1, 1926 (R. 9, #9, 10). According to the evidence, however, Smith told Ohl's representative Kolarsi on September 1st of this 16" bearing and the broken part in the clutch assembly (R. 66) that the Boston Engineering Company broke, and told

him the stringers were not bent straight (R. 66). All of this had been covered in the two preceding notices, and nothing new is included in this notice.

The sixth notice on September 3d (Ex. MM, R. 40) (R. 10, #9f), adds nothing to the preceding four. What has just been said applies to these two notices equally well.

The Seventh Alleged Notice (R. 102, Ex. 20).

No seventh notice is specified (R. 8, 10). Smith is therefore precluded from claiming it as a notice.

If, as we contend, the machine had that "safety device" to which under the contract Smith was entitled (*supra*, B (6)), there is nothing in this notice indicating that either the "bowing" or the "break" was due to any defect in the machine as originally delivered to and accepted by Smith. Rather does this report and that of Professor Norton (R. 98) establish that in the opinions of Professor Norton of Harvard and Professors Swett and Mr. Townsend of Technology, as disinterested, non-partisan experts, the machine had the capacity the contract called for and a sufficient factor of safety, but that the Hovasse experiment and Smith's continued operation without sufficient clearance between the dies caused the break and that the "construction of the female portion of the die" caused the bowing.

Moreover, the evidence shows that on November 22d (R. 106) the "professors" reported to Ohl's then counsel Sanderson and Smith's counsel *in care of Smith's counsel* their observations of the press and its alleged shortcomings (R. 102). The evidence does not show when after its date Smith's counsel gave that report to Ohl. The break in the stanchion occurred on October 15th (R. 93). The report is dated some five weeks afterwards. With so serious an alleged defect, the surrounding circumstances required immediate notice to Ohl, and did not from any viewpoint justify a delay in excess of five weeks for any notice.

CONCLUSION UNDER C.

We submit that as a matter of law Smith failed to give Ohl that notice which under the Massachusetts Sales Act is a condition precedent to any liability of Ohl to Smith for any breach of any warranty under this contract, and that Ohl therefore becomes entitled to a directed verdict in its favor in each case (Assignments 28, 29, R. 252, 211).

D.

OHL AS PLAINTIFF WAS ENTITLED TO A DIRECTED VERDICT, OR, IN THE ALTERNATIVE, TO HAVE THE COURT REQUIRE SMITH TO ELECT HIS REMEDY.

(1)

DIRECTED VERDICT.

On November 17, 1927, Ohl sued Smith on its promissory notes (R. 2). On December 7th Smith sued Ohl (R. 230). On February 29, 1928, Smith pleaded a general denial, want and failure of consideration (R. 3).

Had Smith in that action intended to claim recoupment damages for *partial* failure of consideration based on breach of warranty, damages as a *pro tanto* defense to the notes, it was obliged so to plead that claim.

> "Total failure may always be pleaded and shown in defense; *partial failure, only* when ascertained and liquidated, unless offered as evidence in reduction of damages, under the rule which permits such defense in certain cases, *when it is properly pleaded,* to avoid circuity of action."
>
> *Hodgkins* v. *Moulton,* 100 Mass. 309, 310, 311.

> "*A partial failure of consideration must be specially pleaded.* Inasmuch as that issue was not open under the pleadings, the instruction requested was properly

refused, and the defendant's exception must be overruled. Under R. L. c. 73, §45, 'partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.' By statute *such a failure* is made a matter of defence as against any person not a holder in due course, and the burden of proof thereof is upon the defendant, who *must set it up in his answer in case he wishes to rely upon it.* R. L. c. 73, §45. McCormack v. Williams, 88 N.J. L. 170. The common law rule was the same. Hodgkins v. Moulton, 100 Mass. 309, 310. Shoe & Leather National Bank v. Wood, 142 Mass. 563. Such a defence is analogous to that of recoupment, *which must be specially pleaded.* Davis v. Bean, 114 Mass. 358. Wentworth v. Dows, 117 Mass. 14. Sayles v. Quinn, 196 Mass. 492."

Indiana Flooring Co. v. *Samuel Rudnick,* 236 Mass. 90, 92, 93.

Farmers State Bank &c. v. *Parr,* 234 Ill. App. 78, 87, and cases.

Smith did not so plead, but elected to claim its damages in its own cross-action. On March 20th it entered its case and filed its declaration on that basis (R. 230 *et seq.*). At the trial the writs and pleadings in each case having been read to the Court and jury, Ohl made out its *prima facie* case by introducing the notes and rested (R. 11). Smith then "opened his case" and introduced its evidence (R. 11 *et seq.*). The trial proceeded on the issues raised in Smith's case and was "treated all along as if there were only one" case (Judge's charge, R. 220, lines 5, 6). Uncontroverted evidence established beyond dispute that Smith had elected not to rescind the contract, but to retain the machine the contract called for (Charge, R. 220, lines 15-16), and seek damages for breach of warranty.

"If the facts were as alleged, in the second action, the defendant in the first action, on discovering the breach of the warranty, might avail himself of his rights in either of three ways: He might rescind the contract, return the property and recover back the money that he had paid, Bryant v. Isburgh, 13 Gray, 507; he might set up the breach of the warranty as a defence, in whole or in part, to the claim for compensation in the first action; or he might pay the claim and bring an action for his damages. Hunt v. Brown, 146 Mass. 253, 255. Riley v. Hale, 158 Mass. 240, 246. Gilmore v. Williams, 162 Mass. 351. He elected to answer only a general denial to the action for compensation, and he brought his action for damages for the breach of the warranty. That left the first action unaffected by this claim for damages, inasmuch as there was no attempt to set them up in recoupment."

Cox v. *Wiley*, 183 Mass. 410, 412.
The John Service, Inc., v. *Goodnow*, 242 Mass. 594, 598.
See *Truslow & Fulle, Inc.*, v. *The Diamond Bottling Co.*, 112 Conn. 181, at 186.

Smith followed the same course as "the defendant" in the above case, pleaded general denial, want and failure of consideration, but in no way pleaded the *pro tanto* defense open to him under the Negotiable Instruments Law or the recoupment defense open to him at common law and under the Sales Act.

Smith, however, now makes the same claim as did that "defendant."

"It is contended that the findings in the municipal court must have been in accordance with the direction of the trial judge in Cook v. Castner, 9 Cush. 266, referred to in Star Glass Co. v. Morey, 108 Mass. 570,

573. But in that case the damages were pleaded in recoupment of the first action, and were sued for in a second action. The cases were tried together, and the claimant of damages, instead of electing the suit in which he would have his damages assessed, preferred to claim them in both, and the jury were permitted to consider them in answer to the first suit, and then to consider whether they were more than enough to meet the claim of the plaintiff in that suit, and to allow the surplus, if any, to the plaintiff in the second suit. It was held that no injustice was done by this method, and the exception to it was overruled. Perhaps it would have been better practice to compel the claimant to elect. But in the present case the pleadings would not allow this method of trial in the municipal court, and we must assume that no damages for a breach of the warranty were considered in the first suit."

Cox v. *Wiley,* 183 Mass. 410, 413.

There being no specific denial or call for proof of Smith's signatures to the notes (Mass. G.L. c. 231, sec. 29), the notes sued on being "deemed prima facie to have been issud for a valuable consideration" (Mass. G.L. c. 107, sec. 47), Smith's uncontroverted evidence establishing original consideration, no total failure of consideration, no rescission and its own retention of the goods, there was no jury issue left in *Ohl* v. *Smith,* and on Ohl's motion, therefore, it was the Court's duty to direct a verdict for Ohl.

Baltimore & Ohio R.R. Co. v. *Groeger, Admx.,*
266 U.S. 521, 524.
Assignment 28 (R. 211, 252).
Request #8, 9, Assignment 32 (R. 212, 252).

(2)

BUYER'S ELECTION OF REMEDIES.

The trial court, however, in its denial of Ohl's motion for a verdict in its suit, improperly treated Smith's breach of warranty claim as a *pro tanto* defense based on a partial failure of consideration. On that basis the Sales Act imposes on Smith the obligation to elect between such *pro tanto* defense and its affirmative cross-action claims. Certain of Ohl's requests which the Court refused were directed to that point.

Mass. G.L. c. 106, sec. 58, (1), *a, b,* (2).

At common law partial failure of consideration, based on a claim for breach of warranty, could be a *pro tanto* defense —a recoupment—in a suit on a purchase note.

> "It is well settled in his Commonwealth that where a note is given for goods sold under such circumstances as give the buyer the right to rescind the contract, if the buyer rescinds, the note is avoided as between him and the seller; but if the buyer does not rescind, and allows the contract to stand, the seller can recover upon the note subject to the right of the buyer to reduce the amount as though the action were brought on the contract of sale. And this rule is applicable whether the right to rescind is based upon the fraudulent conduct of the seller or otherwise. In other words, the buyer may rescind or not. If he rescinds, the note in the hands of the seller is avoided. If he does not rescind, but avails himself of the contract, then the seller may recover upon the note subject to a deduction which ought to be made from the plaintiff's demand, as though the action were upon the contract of sale. Harrington v. Stratton, 22 Pick. 510. Perley v. Balch, 23 Pick. 283, 286."
>
> *Daniel* v. *Learned,* 188 Mass. 294, at 296.

Under the Negotiable Instruments Law that defense is still available by statute.

Mass. G.L. c. 107, sec. 51.
Jones v. *Revere Preserving Co.,* 247 Mass. 225, 227.

Whether this defense of partial failure of consideration is called "recoupment," as in *Wentworth* v. *Dowes,* 117 Mass. 14, 15, or "a defense pro tanto" as in the Negotiable Instruments Law, it is the right which the Sales Act and the common law called recoupment.

Mass. G.L. c. 106, sec. 58, (1), (*a*).
See 57 C.J. 358, sec. 1, defining recoupment.

This right of recoupment for breach of warranty or an independent action for breach of warranty under the Sales Act, as well as at common law, are mutually exclusive.

Gilmore v. *Williams,* 162 Mass. 351, 352.
Mass. G.L. c. 106, sec. 58, (1), *a, b,* (2).

Where both remedies, however, are sought, as here, in cross-actions, the ancient practice allowed the complicated process of dealing with the buyer's rights with special instructions as to buyer's damages: If the jury find the buyer's damages due to breach of warranty equal or exceed the unpaid purchase price, then the jury find for the buyer in the seller's suit and for the buyer for the excess of such damages in the buyer's suit. If the jury find such damages are less than the purchase price unpaid, then they find for the seller in the buyer's suit and for the seller in the seller's suit for the deficiency of buyer's damages under the unpaid purchase price.

Cook v. *Castner,* 9 Cush. 266, 277.
Star Glass v. *Morey,* 108 Mass. 570, 573.

That old practice was condemned in, and apparently abandoned after, the decision in *Cox* v. *Wiley,* 183 Mass. 410, 413, and modern practice, to avoid jury confusion resulting from this procedure, requires the buyer to elect between his remedies at the close of the evidence.

Mark v. *Stuart-Howland Co.,* 226 Mass. 35, 43.

Had the rule under the old practice been followed, the mistaken verdicts (R. 226) would have been unlikely; and had the modern practice been observed, they would have been impossible.

The judge, having refused to require an election, left this issue in an entirely confused state to the jury. He told them: *"The Smith Company keeps the machine. The Smith Company has not said that the dies were improper"* (R. 220). He then leaves them in a position where they are told they can give Smith the machines and dies, return to him his money, and damages in addition. In effect the Court gave Smith the benefit of the rescission so far as liability is concerned and enforcement of the contract so far as its obligations thereunder are concerned.

Ohl's requests 2, 3, 4, 5 and 6 under assignment 30 (R. 252), 9a under assignment 31 (R. 252), and 7, 8, and 9 under assignment 32 (R. 252) should have been given, its exceptions to the Court's refusal should be sustained and Ohl's exceptions under assignments 26 and 27 (R. 251) to the Court's refusal to require Smith to elect its remedies should be sustained.

E.

DAMAGES.

(1)

Market Value.

For breach of warranty of quality the buyer's damage ordinarily is the difference between the value of the goods

at the time of delivery and the value they would have had if answering to the warranty.

Mass. G.L. c. 106, sec. 58 (7).

Moss v. *Sherburne,* 11 F. (2d) 579, 582 (C.C.A. 1).

National Wholesale Grocery Co. v. *Mann,* 251 Mass. 238, 250.

The press was delivered on March 15, 1926 (R. 60). It was used from April 15th (R. 61) until it was broken by Smith on October 15th (R. 93, 94). After that break was repaired the press was used continuously to the time of trial (R. 81). Trouble had been experienced with the press, repairs made, changes made, and experiments attempted by Smith. The case was given to the jury on May 7, 1929 (R. 4), over three years after delivery of the press.

The Court, however, applying this rule of damages in one place, instructed the jury to consider the worth of this press "in its present condition" (May, 1929), in another, "before it was broken—before it broke" (October, 1926) (Assignment 48, R. 261, 220). Not only is the charge confusingly inconsistent in applying the October, 1926, date and the May, 1929, date, but is on either basis inaccurate. The time of delivery which the statute specifies as the essential date was in March, 1926 (R. 60).

Ohl's exceptions M, N, P (R. 222, 220) under assignment 48 (R. 261) should be sustained.

(2)

CONSEQUENTIAL DAMAGES—REPAIRS.

We do not contend that repairs may not, under G.L. c. 106, sec. 58, (6), (7), in certain cases be a proper element of damages. We contend, however, that where the Court has instructed on the market value basis the cost of repairs *per se*

are not as matter of law to be added to the market value damage without qualification.

Assume the value of the goods in conformance with the contract is $10,000. Assume the value as delivered is $8000. The buyer's damages under the market value rule is $2000.

Assume that by repairs costing $2000 the buyer puts the goods in the condition the contract called for. Then the buyer's actual damage is $2000, and no more. Under the instructions in this case (R. 220, 221), however, that second $2000 repair item is added to the first $2000 depreciated market value item to make the buyer's damage $4000 instead of the $2000 to which he is entitled. Thus the buyer finally gets a $10,000 machine at a net cost to him of $6000, which, on the basis of value found, was worth $8000 when received.

The Court gave Smith damages for the money equivalent of the defects in the press, together with the amount of the expenditure necessary to correct these defects in the press when delivered. Such instructions allowed Smith to duplicate damages.

Under the correct rule such damages are the amount in dollars and cents which the value of the press as delivered fell short of the value which it would have had if in accordance with the contract plus the cost of reasonable repairs less the enhancement in value through those repairs.

See *Moulton* v. *McOwen,* 103 Mass. 587, 591, 598.

Ohl's exceptions O and Q (R. 223) under assignment 49 (R. 261) should be sustained.

(3)

THE VERDICTS UNDER THE EVIDENCE AND INSTRUCTIONS.

(I)

Assume on the evidence most favorable to Smith the rule of *Cook* v. *Castner* (*supra,* D (2)) had been applied.

The only evidence of value of the press, if in accordance with the contract, is in Exhibit D (S. 1) $10,300. Assuming Smith's figure of its value when delivered was $2500 (R. 115), there is a difference of $7800. Smith spent for repairs $673.44, $1858.31, or $2531.75 (R. 109). Assuming those repairs in no way enhanced that $2500 delivery value, Smith's total damages became $10,331.75. The balance Ohl sued for is $6504. This leaves an excess damage of $3827.75, which, under the *Cook* v. *Castner* rule and on this evidence and assumption, was the maximum verdict to which Smith could have been entitled.

(II)

The Court ruled Smith made no complaint about the dies (R. 220), and confined its damage instruction to the press or machine (R. 218-221).

The dies had a value of (Ex. 17, S. 34)	$1,214.68
The value of the press on delivery was (R. 115)	2,500.00
Giving a total value on the evidence and instructions of	$3,714.68
Smith paid Ohl $4963 (R. 220) and spent for repairs $2531.75 (R. 109), making his total cost	$7,494.75
Deduct the above value of	3,714.68
And we have an actual damage under instructions and evidence most favorable to Smith of	$3,780.07

This figure is further reduced when the motor, about which there was no complaint, valued at $310 (S. 1, Ex. D), is considered and is further reducible to the extent that the $2531.75 repairs corrected deficiencies in the press when delivered increasing the $2500 delivery value.

The $7500 verdict is again seen inconsistent with the evidence most favorable to Smith and with the instructions.

(III)

The Court in the Smith case instructed the jury: "So with the Smith Company having paid nearly $5,000 and having spent nearly $2,500 you will find what the machine is worth and if it *is* worth less than the $5,000 they paid you may find a verdict for the difference for the Smith Company and in addition to that you may add to it the amount which they spent for repairs in the neighborhood of $2,500" (R. 221).

Under those instructions the verdict was	$7500
Deduct the repairs figure of	2500
and we have as Smith's damage, in addition to the repair costs	$5000
Deduct what on these instructions Smith paid	$5000
and we have as a value of the press which the Court instructed the jury to find	Nothing

Yet Smith's own evidence admitted a $2500 value (R. 115) for the press, which, together with the dies and motor, had sufficient value so that Smith kept, used and doubtless still is using them.

(IV)

These verdicts permit Smith to keep the press, dies, and motor without paying a cent for them. Smith paid Ohl $4963 (R. 220); spent on repairs $2531.75 (R. 109), a total of $7494.75. The Ohl verdict excuses Smith from paying the balance due Ohl. The Smith $7500 verdict repays Smith all he has paid and spent, so that under these verdicts Smith keeps the press, dies, and motor, for all of which it pays nothing at all.

(V)

The foreman in substance said the jury's intention was to apply the $6504 note balance against the $7500 verdict (R.

226). Doing so would leave roughly $1000 in Smith's favor. The evidence most favorable to Smith is consistent with that intention and result. The press value when delivered was $2500 (R. 115). The dies and motor, not complained of, were worth $1500 (S. 34, Ex. 17; S. 1, Ex. D), a total value of $4000. Smith had paid Ohl $5000 (R. 220), or $1000 more than, on this evidence, the value Smith received. Hence the set-off the jury intended was logical and the verdicts they intended consistent with the evidence, considering their intention to find generally in Smith's favor. The verdicts they rendered were illogical and inconsistent.

F.

EXCEPTIONS BASED ON ADMISSION AND EXCLUSION OF EVIDENCE.

(1)

Test Bars from Broken Stanchion.

As we have already explained, when the Tech professors attempted, on October 15, tests on the press they broke one of its stanchions. Smith injected into the case a claim of defective material in the machine.

Perkins, one of Smith's expert witnesses, testified that in his opinion the break in the stanchions was due to crystallization and metal fatigue (R. 113). Townsend's report showed the press, through faulty operation, "had weakened in a vital spot" (R. 105). In Smith's cross-examination of Ohl's foundryman, Davis, a witness called in rebuttal, Exhibits OOO, 1, 2, 3 and 4 had been introduced (R. 134).

They were four pieces of metal originally comprising two test bars made according to the specifications shown in Exhibit RRR, figure 2 (see R. 255, #11, and Ex. RR, S. 21). On the promise of Smith's attorney to show that these test bars came from this press (R. 208) the Court admitted evidence as to the tensile strength of these bars (R. 208,

209) without proof or offer of proof as to when they were taken from the press—before or after this crystallization—or as to the place in the stanchion from which they were taken with respect to the break in the stanchion. It later appeared that both these test bars were taken during trial and from the broken stanchion at a point "just below the fractures" (R. 205), and that the one taken from the place nearest the fracture showed 1200 pounds per square inch less tensile strength than the one taken a little further away (R. 210).

Ohl's objections to the admission of testimony based upon these tests should have been sustained and its exceptions under assignments 24 and 25 should be sustained (R. 208, 209, 251).

Anticipating, from Smith's cross-examination of Ohl's foundryman, Davis (X-Q. 21, R. 134), that Smith would offer such testimony, Ohl in redirect asked Davis whether or not stressing metal to a point of metal fatigue would affect the tensile strength of the metal (Q. 26, Q. 27, R. 135). These questions the Court excluded, and Ohl's exceptions to their exclusion under assignment 19 (R. 249, 135) should be sustained.

(2)

FOUNDRY GUARANTY.

It was immaterial whether Ohl's foundry guaranteed to Ohl the tensile strength and the endurance of the housing in this case (R. 132, 133). No such aspect had been opened by Ohl with this witness or others. The testimony was prejudicial to Ohl in the inference that, because the foundry did not guarantee these castings to Ohl, the housings were not what the contract called for. Ohl's exception (R. 133) under assignment 18 (R. 249) should be sustained.

(3)

OPINION EVIDENCE—OMITTING AN ESSENTIAL.

It was uncontroverted that greater force is required to bend on a 2¼" than on a 3" die (R. 91, 100, 138, 140, 150). Ohl's warranty specified a capacity to bend on the basis of a *3" die* (Ex. A, R. 11). Yet the Court, subject to Ohl's exceptions, admitted evidence as to bending ⅜" stock without any die being specified (R. 245; Assignment 7, R. 91).

The largest die Smith had was "supposed to be 2¼" but measured 2 5/16" (R. 79), was ordered for ¼" stock maximum (R. 54, Ex. 18; R. 12, Ex. A, last die specified), and the witness being examined had never bent over ¼" stock on it (R. 88). Yet the Court admitted opinion testimony through this witness to show the press could not bend ⅜" stock on that same 2¼" die (R. 91, 246, Assignment 8). Like testimony was again admitted based on a 2¼" die (R. 111, 246, Assignment 11).

Later the Court admitted testimony as to the actual capacity of this press based on computations without any evidence as to the die used in those computations (R. 112, 247, Assignment 12). On cross-examination of this witness it appeared that in making these computations the witness had used a 2¼" die (R. 116).

Ohl's exceptions under assignments 7, 8, 11 and 12 should be sustained (R. 245, 246, 247).

(4)

UNITED STATES GOVERNMENT METAL SPECIFICATIONS WERE ERRONEOUSLY ADMITTED.

This contract in no way referred to any specifications of quality or kind of material to be used except that the material was to be "of the best" (Ex. A, R. 11). To prove, however, that Ohl was obligated to deliver a press with castings testing to a particular standard, Smith offered and the

Court admitted, subject to Ohl's exception, United States Army Ordinance Department Metal Specifications (R. 205, Ex. RRR, S. 21-26, Assignment 23, R. 251). There was no evidence to show or claim made that such specifications were so universally adopted and recognized in the trade as to make them competent evidence of a trade custom. Specifications used commercially were later shown to be quite different (Ex. 32, R. 207; S. 36, 37), requiring a tension test for heavy castings of 24,000 pounds (S. 37, par. 6), as compared with the Army requirement of 30,000 pounds (S. 22, Table 2).

These Army specifications were not only incompetent but their admission was highly prejudicial to Ohl. Ohl's exception to their admission (R. 205; Assignment 23, R. 251) should be sustained.

G.

ADDITIONAL EXCEPTIONS TO THE CHARGE AND REFUSALS TO CHARGE.

(1)

ASSIGNMENTS 45 AND 46 (R. 257).

It appeared through the Smith testimony that, before the press broke, Smith's master mechanic, Hovasse, had experienced trouble with the press, had made repairs and had "experimented" by installing sub-supports under the bed of the press to counteract bowing (R. 77). It also appeared that this experiment was designated as a cause of alleged defects of the press observed in October by Smith's consulting engineers (R. 104, Q. 2; R. 106, Q. 4).

Inasmuch as the Court did not anywhere cover this point in the charge, on this uncontradicted evidence from Smith's witnesses Ohl was entitled to its 61st request, that "Ohl is not responsible for a damage to the machine resulting from the defective sub-support criticised in Ex. 20" (R. 260, Assignment 45).

Smith's evidence showed defects and repairs as well as this experiment before the break. The engineers' report showed as an adequate cause of the break the improper operation of the press in the past through application of an excessive load, which "eventually caused the rupture" (R. 105, Q. 3). This aspect the Court ignored in its charge, and instructed the jury to determine whether or not at the time the press broke it was being properly operated (R. 219, 260, Assignment 46).

Ohl's exceptions under assignments 45 and 46 (R. 260) should be sustained.

(2)

THE INADEQUACY OF THE CHARGE.

"A magistrate presiding over a jury trial ought himself to state in his charge comprehensively, plainly and forcibly all the governing principles of law as to the issues raised by the pleadings supported by the evidence so that the jury may clearly understand their duty and be enabled to perform it intelligently."

Maxwell v. *Massachusetts Title Insurance Co.*, 206 Mass. 197, 200.

"This duty is not affected by the absence of specific requests by counsel, and, where attention is properly directed to the omission and it is not remedied, an exception may be sustained if necessary to render substantial justice."

Mahoney v. *Gooch*, 246 Mass. 567, 571.

These instructions should be full and accurate, touching upon every point involved—

Williams v. *Winthrop*, 213 Mass. 581, 583—

to enable the jury to arrive at an intelligent and just verdict.

Sawyer v. *Worcester Consolidated Street Railway Co.*, 231 Mass. 215, at 218.

In such a charge "a party is entitled to something more than the absence of unsound statements of law in a charge; he is entitled to clear and accurate and helpful instructions on the points which it touches."

Mahoney v. *Boston Elevated Railway Co.*, 271 Mass. 274, 280.

In the instant cases, which consumed eleven trial days, with complex fact issues involved, with many, but well-defined, law principles to be applied, with Ohl's 76 requests for rulings (R. 211-218) to be dealt with, the charge in these cases, taking about ten or fifteen minutes, is meagre to the point of legal insufficiency (R. 218-221).

Its most glaring omissions caused mistaken verdicts. The charge in no way instructed the jury as to its verdict in the Ohl case in the event the jury found the press was not what the contract called for. After the verdicts were rendered the jury foreman said that the jury intended by their verdicts to have Ohl's unpaid purchase price notes applied against Smith's damages assessed at $7500 (R. 226), a difference of $6500 against Ohl between what the jury intended and what their verdicts accomplished.

The Court charged that Smith made no complaint about the dies (R. 220) which were priced at over $1200 (S. 34, Ex. 17). The obligation to pay for the motor, priced over $300 (S. 1, Ex. D) was not contested. These two items made a total of over $1500. The charge, however, omitted consideration of these items, and in instructing the jury confined itself to the press and its value.

The Court ruled: "The Smith Company keeps the machine" (R. 220), and yet failed to give the jury any instruc-

tions as to the effect of such action on its part and the liability for payment of the purchase price.

As discussed under "damages," the charge also ignored even the possibility of enhancement in value to the press through repairs, and left the cost of repairs as an independent unqualified element of damages.

Ohl's exceptions R, S, T, and W (R. 223) under assignments 50, 51, 52, and 53 (R. 261) should be sustained.

H.

EXCEPTION TO CONDUCT OF JURORS.

One of the jurors during the trial was observed making notes, and another juror during a recess was seen taking measurements of exhibits. During the trial the attention of the judge was called to this and he was asked to instruct the jury in reference thereto. He refused to instruct the jury that such conduct was improper, and allowed it to continue (R. 210). This again was brought up as one of the grounds relied upon on the motions for a new trial (R. 5, 236).

The measurements of the articles measured by the juror were testified to by the experts who had used scientific instruments for that purpose. The juror's rule may have been accurate and his ability to measure may have been excellent —again, the opposite may be true. Such private measurements by a juror during a trial are not proper.

Ewer's Admr. v. *National Imp. Co.,* 63 Fed. 562.

It is not known what the juror on these various occasions was writing. If it was something not connected with the case, then his inattention was improper. If it was something to do with the case, then such conduct was improper.

> "It was well calculated to divert the attention of the jurors, while they were busy, pencil or pen in hand, from the evidence, as it would naturally be progressing while

such notes were being made. The juror is to register the evidence, as it is given, on the tablets of his memory, and not otherwise. Then the faculty of the memory is made, so far as the jury is concerned, the sole depository of all the evidence that may be given; unless a different course be consented to by the parties or the Court. . . . the jury should not be allowed to take evidence with them to their room except in their memory. It can make no difference whether the notes are written by a juror or by someone else. Jurors would be apt to rely on what might be imperfectly written, and thus make the case turn on a part only of the facts."

Cheek v. *State*, 35 Ind. 492.

Ohl's exceptions (R. 210) under assignment 55 (R. 261) should be sustained.

I.

OHL'S MOTIONS FOR NEW TRIAL.

In each case Ohl seasonably filed a motion for a new trial (R. 5, 236), which was overruled (R. 6, 237) and its bills of exception thereto filed and allowed (R. 226, 239).

Each motion was based on the same eight grounds, three concerning conduct of the jury. The remaining five concerned the verdicts fixing Smith's damage as excessive, against the evidence, the weight of the evidence, the law and the evidence, and the law.

The jury had rendered mistaken verdicts. They intended Ohl's unpaid notes in the suit to be credited against the Smith $7500 verdict (R. 226). That fact, disclosed to Ohl's counsel by the jury foreman, might not have compelled the allowance of the motions if the judge found that the amounts of the verdict as rendered were justified (see E (3), *supra*). The verdicts resulted, however, in transferring the

plaintiff's property to the defendant and gave him a bonus out of the plaintiff's pocket in addition.

The explanation for the mistake is found in the Court's inadequate instructions.

The jury's verdicts were against the evidence in its aspect most favorable to Smith (E (3), *supra*). The Court in each case should have granted Ohl's motion for a new trial, and Ohl's exceptions under assignment 54 should be sustained (R. 261, 5, 6, 226, 236, 237, 239).

J.

CONCLUSION.*

Ohl sued Smith November 17, 1927 (R. 2). Smith set up a general denial, want and failure of consideration, but did not plead recoupment or partial failure as a *pro tanto* defense (R. 3). On the facts and law of these cases that failure to plead that defense established Smith's election to assert its rights in its own suit, limited Smith thereto and entitled Ohl to a directed verdict in the Ohl suit (*supra*, D (1)).

Assuming the trial court properly treated Smith's claim of a breach of warranty as part of its answer in the Ohl case and thus a *pro tanto* defense, even though not pleaded, then the Sales Act applies. Smith having retained the machine, dies, motor and accessories under the act is limited to one of two alternatives:

> (*a*) ". . . set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the purchase price."
>
> (*b*) ". . . maintain an action against the seller for damages for such breach."
>
> Mass. G.L. c. 106, sec. 58 (1) (*a*) (*b*).

* The following is based on the pleadings, Smith's specifications and uncontroverted evidence making it the duty of the trial court to have directed verdicts.

Baltimore & Ohio R.R. Co. v. *Groeger*, 266 U.S. 521, 524.

The act also provides, however, that—

> "When the buyer has claimed and has been granted a remedy in any one of these cases no other remedy shall thereafter be granted."

Mass. G.L. c. 106, sec. 58 (2).

Smith, on this assumption, having first asserted its rights as a *pro tanto* defense to Ohl's suit, and having pursued those rights therein to judgment, Ohl became entitled as a matter of right to a judgment in Smith's cross-action.

If Smith as buyer failed to give notice as required by the Sales Act, Ohl as a matter of right is not liable to Smith for any damages, or Smith to any recoupment in defense to the notes.

Mass. G.L. c. 106, sec. 38.

Ohl seasonably in each case moved for a directed verdict (R. 4, 236), and seasonably excepted to the Court's refusals to grant the same (R. 211; Assignments 28 and 29, R. 252).

We submit that this Court in each case should reverse the judgment of the Circuit Court of Appeals and of the District Court and, as all facts pertinent to election and notice are uncontroverted, should order the District Court to enter judgment in *Ohl* v. *Smith,* No. 228, for Ohl for $6504, principal, and in No. 229, *Smith* v. *Ohl,* judgment for the defendant, or, in the alternative, as a minimum that Ohl's exceptions should be sustained in both cases and the same remanded for further proceedings to the trial court.

Respectfully submitted,

LEE M. FRIEDMAN,
LOUIS B. KING,
FRIEDMAN, ATHERTON, KING & TURNER,
Counsel for GEORGE A. OHL & Co.

FILE COPY

Office Supreme
AUG 26
CHARLES

Supreme Court of the United States.

October Term, 1932.

No. 228.

George A. Ohl & Company,
Petitioner,

v.

The A. L. Smith Iron Works,
Respondent.

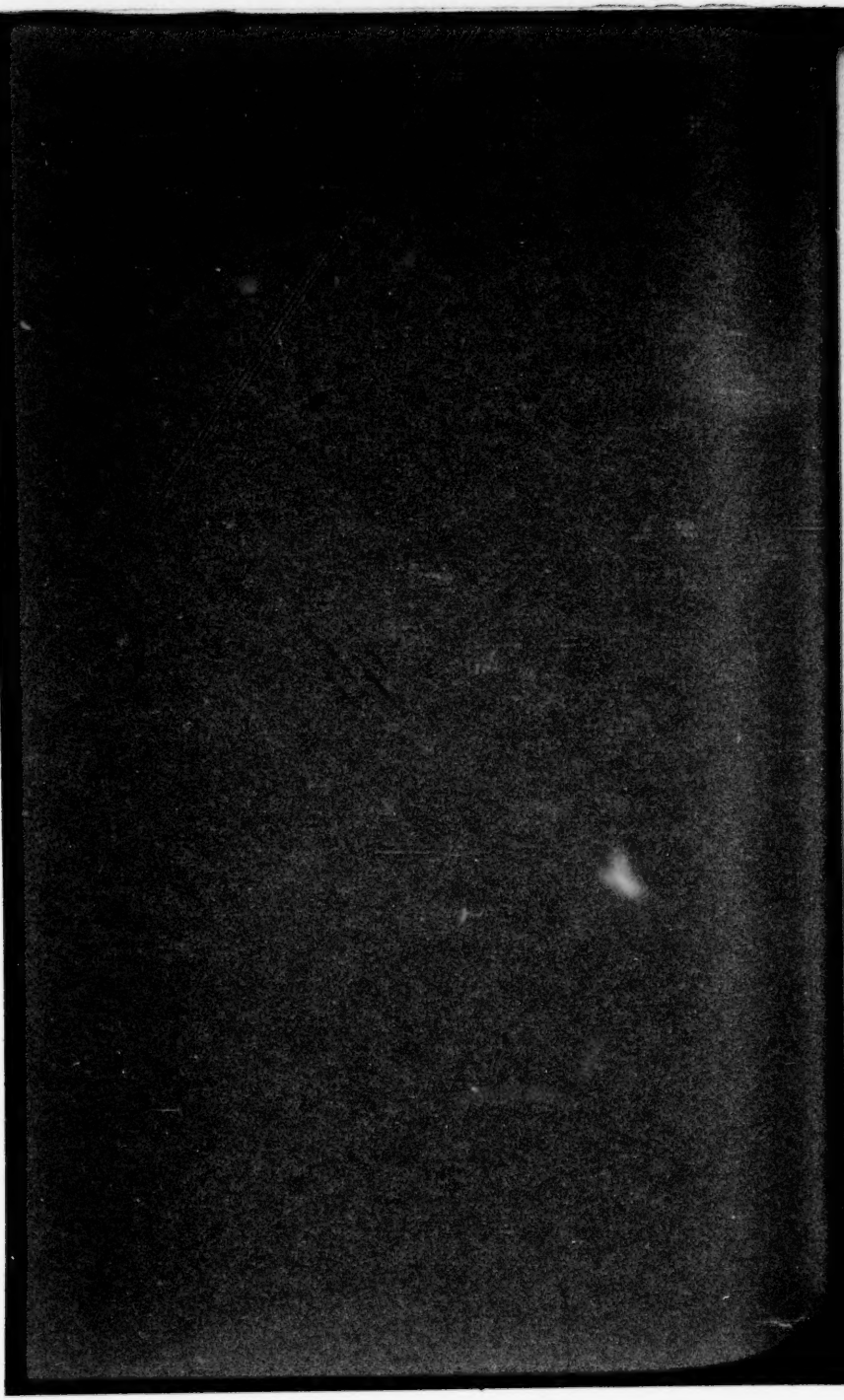
No. 229.

Same v. Same.

Brief for Respondent in Opposition to the Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

LOWELL A. MAYBERRY,
ROBERT GALLAGHER,
MARTIN WITTE,
SAMUEL ABRAMS,
Attorneys for The A. L. Smith Iron Works,
Respondent.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.



INDEX.

	Page
I. Rule 35 of the United States Supreme Court	1
II. Facts	2
III. Comments on the petitioner's suggestion relative to the alleged bills of exceptions	7
Argument	8
A. The bills of exceptions were not authenticated as required by section 953 of the Revised Statutes	9
B. The Circuit Court of Appeals was right in refusing to treat the lack of authentication as harmless error	10
C. The Circuit Court of Appeals did not err in refusing to permit amendments to cure the defects in the so-called bills of exceptions	13
Conclusion	26

TABLE OF AUTHORITIES CITED.

Barber Asphalt Co. v. Standard Asphalt Co., 275 U.S. 372	20, 21, 22
Chateaugay &c. Co., Petitioner, 128 U.S. 544	25
Davis v. Patrick, 122 U.S. 138	25
Dredge v. Forsyth, 2 Black, 566	25
Exporters v. Butterworth-Judson Co., 258 U.S. 365	17, 18, 24
General Rule 75, In re, 222 Fed. 884	22
Gilmer v. Higley, 110 U.S. 47	11
Goetzinger et al. v. Woodley et al., 17 F. (2d) 83	12
Hume v. Bowie, 148 U.S. 245	25
Hunnicutt v. Peyton, 102 U.S. 333	25
Jones v. Grover &c. Co., 131 U.S. Appx. cl	24
Kalanianole v. Smithies, 226 U.S. 463	11
Knight v. Illinois Central Rd. Co., 180 Fed. 368	13
Krauss Brothers Lumber Co. v. Mellon, 276 U.S. 386	10, 11, 12
Malony v. Adsit, 175 U.S. 281	12, 20, 23

Page

Michigan Insurance Bank v. Eldred, 143 U.S. 293 14, 17, 18, 24
Muller v. Ehlers, 91 U.S. 249 24, 25
Origet v. United States, 125 U.S. 240; 57 F. (2d) 44 2, 9, 10, 12, 17, 20
Oxford &c. Rd. Co. v. Union Bank, 153 Fed. 723 12, 13, 20
Seaboard Railway v. Moore, 228 U.S. 433 11
Shuman v. United States, 16 F. (2d) 457 11
Star Glass Co. v. Morey, 108 Mass. 570 6
Steen v. First National Bank, 298 Fed. 36 8, 10
Struett v. Hill, 269 Fed. 247 22
Sussex &c. Co. v. Midwest &c. Co., 294 Fed. 597 22
Taylor v. United States, Advance Opinions of United States Supreme Court, 1931-1932, p. 662 22, 23, 24
United States v. Breitling, 20 How. 252 24, 25
United States v. Mayer, 235 U.S. 55 22
United States (ex rel. Kinney) v. U.S. Fidelity Co., 222 U.S. 283 9, 12, 15, 20
Vicksburg &c. Rd. v. O'Brien, 119 U.S. 99 11
Waldron v. Waldron, 156 U.S. 361 25
Walton v. United States, 9 Wheat. 651 24
Webster v. Fall, 266 U.S. 507 20

STATUTES.

Act of June 1, 1872, c. 225, now section 953 of Revised Statutes 9
Revised Statutes, sec. 953, U.S. C.A. tit. 28, sec. 776 9, 11, 12, 19
St. February 26, 1919, c. 48, now part of U.S. Code, tit. 28, sec. 391 11
United States Supreme Court Rule 35, par. 2 1, 4

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 228.

GEORGE A. OHL & COMPANY,
PETITIONER,
v.
THE A. L. SMITH IRON WORKS,
RESPONDENT.

No. 229.

SAME *v.* SAME.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

I.

RULE 35 OF THE UNITED STATES SUPREME COURT.

Rule 35, paragraph 2, seems to limit the contents of the petition for a writ of certiorari to a "summary and short statement of the matter involved and the reasons relied on for the issuance of the writ." It further provides "A supporting brief may be included in the petition, but . . . it must be direct, concise . . ."

It is assumed by the respondent that the true issues raised by the petition are fully and succinctly stated in the opinion of our Circuit Court of Appeals—

57 F. (2d) 44 (Record, p. 264 *et seq.*)—

and do not require or justify the inclusion, by reference or otherwise, of such extraneous matter as the petitioner's brief to the Circuit Court of Appeals, petition for rehearing, affidavits, certificates, and the like.

However, the respondent states merely its understanding of the latitude of the rule, and hereinafter deals with some of these documents upon the assumption that the Court may deem them to be relevant.

II.

Facts.

The respondent proceeds to a statement of those facts and proceedings which it understands to be pertinent under the rule.

The original writs in the cross-actions between these parties were brought in the latter part of 1927 (Record, pp. 2, 227).

The action by the Ohl Company (petitioner) was based on a series of notes representing the balance of the purchase price of a machine which it had sold to the Smith Works (respondent) (Record, pp. 2-3).

The action by the respondent was based on breaches of warranty, express and implied, under which said machine was sold (Record, p. 228).

The answer to the action on the notes was a general denial, lack of consideration, and failure of consideration (Record, p. 3).

The answer to the action on the breaches of warranty was a general denial and acceptance of the machine (Record, p. 231).

The respondent, in compliance with the requests of the petitioner, filed certain specifications of defects in and failures of the machine to perform the uses to which the parties intended it to be applied (Record, pp. 8-11, 233).

The actions were tried together before a jury in April and May of 1929, and the trial consumed about three weeks (Record, p. 4).

In the action by the petitioner the jury returned a verdict for the respondent. In the action by the respondent the jury returned a verdict for the respondent in the sum of $7500. These verdicts were returned on May 7, 1929 (Record, pp. 5, 234).

On May 9, 1929, the petitioner filed a motion for a new trial in each case.

In the action brought by the petitioner the motion was specifically confined to certain alleged misconduct of one or more of the jurors and to "the verdict as it concerned the defendant's damage" (Record, pp. 5, 6, 206, top).

In the action brought by the respondent the petitioner's motion was confined to the same grounds except that the word "plaintiff" was substituted for the word "defendant" (Record, p. 235).

These causes were thence continued from term to term to the March term, 1930, *i.e.*, May 14, 1930, on which date they were set down for hearing and overruled (Record, pp. 6, 235).

On August 8, 1930, a writing was filed entitled "Substitute Bill of Exceptions on Behalf of George A. Ohl & Company," and this writing contains the notation "Allowed August 20, 1930, J.A.L. D.J." This paper was expressly made applicable to both cross-actions and so treated (Record, pp. 7, 236).

Near the bottom of page 2 of the petition it states that "the trial judge, in counsels' presence, examined the bills and orally allowed them." If material, the respondent points out that this statement is presumably an inadvertence; since the filing of its petition the petitioner has ad-

dressed a communication to the Court amending said statement so as to disclaim any possible inference that the respondent's counsel was present on that occasion.

On September 8, 1930, judgments were entered as follows: For the respondent in the action by the petitioner; and for the respondent in the sum of $7500 in its action against the petitioner (Record, p. 236).

Petitions for appeal were filed and allowed November 25, 1930 (Record, pp. 222, 237).

The clerk of the District Court certified the appeals on January 22, 1931 (Record, pp. 226, 263).

The cases came on to be argued before the Circuit Court of Appeals on October 22 and 23 of 1931 (Record, p. 264).

At the outset of the respondent's brief, and before proceeding to a discussion of the petitioner's assignments of error, the respondent moved that the alleged bills of exceptions be stricken from the record, and assigned reasons therefor in its said brief (Footnote to page 4 of the petition) (Opinion of Judge Morris, Record, pp. 266-267).

On March 22, 1932, the Circuit Court of Appeals rendered its opinion affirming the judgments of the District Court, with interest and costs (Record, p. 270).

On April 20, 1932, the petitioner filed an application for rehearing to the Circuit Court of Appeals, and on May 6, 1932, said application was denied (Record, p. 313).

The respondent submits that under Rule 35 the petitioner is confined to the foregoing record facts, and exceeds the latitude of the rule by incorporating in its petition, by reference or otherwise, and by discussing matter contained in the so-called bills of exceptions, statements and affidavits grafted onto the record.

However, out of an abundance of caution and in the interest of accuracy, the respondent will at this point comment on a few of the extraneous suggestions of the petitioner. The petitioner says, on page 2, lines 8 to 11 of its petition, that the machine in question was in use at the respondent's factory at the time of trial. Whatever the pur-

pose of this statement may be, the respondent points out that its action is for breach of warranties; it further points to a few portions of the testimony to which the petitioner has failed or neglected to call the Court's attention. For example: the material wrought by the machine was "bowed" in such a way as not to be a commercial job (Record, pp. 65-66). On October 15, 1926, the machine broke at two vital places while being operated under the supervision of Professor Swett and his assistant, Mr. Townsend, both of the faculty of the Massachusetts Institute of Technology (Record, pp. 68, 94). Because of the necessary repairs required by the fractures, some 18 inches in the usable length of the machine were lost (Record, p. 69). The machine was not properly constructed, because of the lack of an efficient safety device (Record, pp. 97-98). There were blow-holes in the casting of the stanchions which supported the machine (Record, pp. 177-179). Even before the machine broke, its value was about $2500 (Record, p. 116). The machine was not strong enough to set (form) ⅜ inch material into stair-treads, stair-stringers, and stair-risers (Record, pp. 181, 15).

In this connection the respondent respectfully directs the Court's attention to the language of the warranty relating to the machine (Record, p. 11) and the specifications referred to in said warranty (Record, p. 49, top).

At page 2 of its petition, line 12, the petitioner calls the verdicts "absurd." If any answer is necessary to this charge the respondent respectfully refers to the fact that, as the record discloses, the jury returned its verdicts only after three weeks of fairly intensive trial, during which a mass of conflicting oral evidence, many documents, letters and photographs, and specimens of the products of the machine were introduced; the presiding judge denied motions for new trials (Record, pp. 5-6, 235). And the Circuit Court of Appeals in its opinion stated that the pleadings in the case were in form to raise the issues between the parties (Record, p. 266).

On page 2 of its petition, line 18, the petitioner states that the "verdicts resulted in the respondent's retaining the petitioner's property without paying for it and being awarded damages because the machine was not worth the contract price."

Whatever may be the purpose of this statement, the respondent points out the following evidence: The contract price was $12,000, in round numbers (Record, p. 11); the petitioner stated the machine was worth $3000 more than the contract price (Record, p. 34); there was evidence from which the jury could have found that the machine was worthless when it was delivered in that it was incapable of turning out merchantable products and was so defective in workmanship and material (which, under the warranty, were to be "of the best"—Record, p. 11) that it broke shortly after its delivery under a test far below the maximum requirements of the express warranty (Record, p. 94); so that the jury could have further found that the difference between the value of the machine as warranted and represented by the petitioner and its true market value was at no time less than $15,000. The jury were further warranted in finding on the evidence that, in order to prevent the machine from collapsing, the respondent expended $2500, in round numbers (Record, p. 110), making total damages suffered by the respondent of $17,500. The respondent owed the petitioner a balance of $6500, in round numbers (Record, p. 7). Thus the jury could have found for the respondent in its action for breach of warranty in the sum of $17,500 and for the petitioner in the sum of $6500 in its action on the notes; or, the jury could have applied first to the action on the notes so much of the said sum of $17,500 as would be sufficient to cancel them and award the excess to the respondent in its own action. The latter course was approved by the Supreme Judicial Court of Massachusetts in—

Star Glass Co. v. *Morey*, 108 Mass. 570, 573.

But the jury evidently regarded the machine as being worth something or discounted its overvaluation by the petitioner, with the result that it reduced the possible balance recoverable by the respondent in its action by $3000, namely, to $7500.

It follows from this analysis that the respondent did not retain the machine without paying for it, but that, on the contrary, the verdicts clearly indicate that the amount of the notes plus the award to the respondent in its case aggregate less than the damages suffered by the respondent. It will also be recalled that the respondent's answer to the action on the notes consisted of a general denial and lack and failure of consideration—not recoupment.

Incidentally, the machine in question weighed 108,000 lbs. (Record, p. 43). It required a special foundation upon which to erect it (Record, p. 62). It was 12 feet 6 inches wide (Record, p. 11), and over 10 feet in height, as is indicated by one of the exhibits; to bend ⅜ inch thick steel into merchantable products it had to exert a pressure of 800,000 lbs. according to the evidence of one expert and about 2,000,000 lbs. according to the evidence of another expert (Record, p. 95). Obviously, such a massive structure could not be easily dismantled or returned without even greater damage to the machine and expense to the petitioner than has already been shown.

III.

Comments on the Petitioner's Suggestions Relative to the Alleged Bills of Exceptions.

At page 14 *et seq.* of the petition and brief the petitioner has undertaken to set forth an "outline of some of the substantial issues involved in trial . . . to show that the questions raised merited consideration in the Court of Appeals."

The respondent cannot foretell whether or not this Court is concerned with the issues raised at the trial of these causes. But, if the Court should consider them relevant or

of interest it is respectfully submitted that the petitioner was, in any event, restricted in its appeal to the precise questions raised by its assignments of error.

Having carefully read the portion of the petitioner's brief, above referred to, and compared the references to the assignments therein with the text of the actual assignments as they appear in the record, the respondent submits that, in each instance, the interpretation and paraphrasing of such assignments by the petitioner is not in accordance with the text thereof.

In the interest of brevity the respondent has avoided a detailed comparison of each paragraph of the petition referred to with the corresponding assignments. Nor has the respondent any basis upon which to meet the assertions at page 14 of the petition and brief, even if it were permissible, because of the apparent variances between said assertions and the texts of the assignments of error referred to.

Argument.

Primarily, the petitioner's grievance would seem to be due to the refusal of the Circuit Court of Appeals to treat the so-called bills of exceptions as being properly before it because of lack of proper authentication.

At no point in the petition, itself, or in the brief accompanying it, does the petitioner seem to question the conclusion of our Circuit Court of Appeals that the alleged bills of exceptions were defective in this respect, unless the petitioner's contention at page 16 *et seq.* of its brief, that said conclusion conflicts with the opinion of the Eighth Circuit in *Steen* v. *First National Bank,* 298 Fed. 36, implies that our Circuit Court of Appeals erred in that respect. That point will be discussed in its order.

The petitioner further contends that our Circuit Court of Appeals erred in refusing to treat such authentication as harmless error or in refusing to permit the bill to be amended.

So that by way of reduction of the fundamental issues upon which we assume the reasons for the petition, pp. 5-6, are predicated, we submit the following:

(A) Were the bills of exceptions authenticated as required by section 4 of the Act of June 1, 1872, c. 225, now section 953 of the Revised Statutes (28 U.S. C.A. 776)?

(B) Should the Circuit Court of Appeals have treated the lack of authentication as "harmless error"?

(C) Did the Circuit Court of Appeals err in refusing to permit amendments to cure the defects in the so-called bills of exceptions after the expiration of the term?

A.

The Bills of Exceptions were Not Authenticated as Required by Section 953 of the Revised Statutes.

As the opinion of our Circuit Court of Appeals points out, this Court has emphatically said that initials upon a paper entitled "bill of exceptions" do not constitute the signature required by said section 953 of the Revised Statutes.

> *Origet* v. *United States*, 125 U.S. 240, 244; 57 F. (2d) 44 (Record, p. 267).

And our Circuit Court points out in its opinion that this Court has adhered to the rule laid down in *Origet* v. *United States* in a later case in which the precise question was again raised.

> *United States* (*ex rel. Kinney*) v. *U.S. Fidelity Co.*, 222 U.S. 283.

Kinney v. *U.S. Fidelity Co.*, 222 U.S. 283, was decided by the Court in 1911, but our Circuit Court is further confirmed in its conclusion by a still later opinion of this Court which

reiterates the rule of *Origet* v. *United States,* 125 U.S. 240, 244.

Krauss Brothers Lumber Co. v. *Mellon,* 276 U.S. 386, 390.

In the case of *Steen* v. *First National Bank,* 298 Fed. 36, cited at page 16 of the petitioner's brief, there was no question as to the judge's *signature.* The full name and title of the judge were subscribed. They merely appeared in a space below the blank provided for the signature. The position of the signature being the only question raised, the Circuit Court of Appeals for the Eighth Circuit refused to dismiss the bill.

It would seem that the point involved in the case at bar is clearly distinguishable from the point in the Steen case.

The opinion in *Krauss Bros. Lumber Co.* v. *First National Bank* was handed down April 9, 1928; whereas the opinion of the Circuit Court of Appeals in the Eighth Circuit in the case of *Steen* v. *First National Bank,* 298 Fed. 36, upon which learned counsel for the petitioner relies to establish a conflict between that circuit and ours on that point, was decided in 1924.

This exposition of the law would seem to eliminate not only the possibility of alleged conflict between circuits, but also any vestige of doubt as to the accuracy of the conclusion of our Circuit Court of Appeals on this point.

B.

The Circuit Court of Appeals was Right in Refusing to Treat the Lack of Authentication as Harmless Error.

In its opinion, 57 F. (2d) 44 (Record, pp. 264, 266), our Circuit Court of Appeals says: "Counsel for the Smith Company (the respondent) take the position that there is a fatal defect in the record, in that the bill of exceptions filed

by the Ohl Company (the petitioner) is not properly authenticated, and for this reason they move that the bill of exceptions be stricken from the record."

At page 269 of its opinion the Circuit Court of Appeals goes on to say: "In the Origet and Kinney cases above cited the Supreme Court was interpreting an Act of Congress and in so doing it held that a bill of exceptions was not sufficiently authenticated unless signed by the judge of the court and that the initials of the judge do not satisfy the provisions of the statute. We are bound by this ruling of the Supreme Court."

Later, in the same paragraph, the Court proceeds: "We see no escape from an order affirming the judgments of the District Court."

The respondent infers that the Circuit Court of Appeals regarded the defect in the authentication as fatal and not as merely trivial.

The "Harmless Error" rule was recognized by this Court long before its translation into statutory form in 1919 (St. February 26, 1919, c. 48, now part of U.S. Code, tit. 28, sec. 391).

Gilmer v. *Higley,* 110 U.S. 47.
Vicksburg &c. Rd. v. *O'Brien,* 119 U.S. 99, 109.
Kalanianole v. *Smithies,* 226 U.S. 463.
Seaboard Railway v. *Moore,* 228 U.S. 433.

It introduces no new principle except that it throws the burden on the complaining party to show by the entire record the denial of some substantial right.

Shuman v. *United States,* 16 F. (2d) 457, 458.

Section 953 of the Revised Statutes, which deals with the method of authenticating a bill of exceptions in the Federal Court, has been in existence since 1875.

Krauss Brothers Co. v. *Mellon,* 276 U.S. 386.

Every one of the following cases, dealing with Revised Statutes 953, have emphasized the necessity of such authentication.

Origet v. *United States*, 125 U.S. 240, 244—1887.
Malony v. *Adsit*, 175 U.S. 281—1899.
Oxford &c. Rd. Co. v. *Union Bank*, 153 Fed. 723—
United States (*ex rel. Kinney*) v. *U.S. Fidelity Co.*, 222 U.S. 283—1911.
Krauss Brothers Co. v. *Mellon*, 276 U.S. 386, 390—1928.

It would seem to be a fair inference from these cases that the Courts have treated such authentication as being a condition precedent to any consideration of a proposed bill of exceptions, and it is noteworthy that none of the Courts, above referred to, which dealt with this lack of due authentication ruled that it constituted mere harmless error. Both the harmless error rule and the authentication statute were in existence concurrently throughout the period covered by the earliest and the latest of the above-cited cases.

The due allowance of a bill of exceptions is a judicial and not a ministerial act, and cannot even be waived by the parties.

Malony v. *Adsit*, 175 U.S. 281.
Goetzinger et al. v. *Woodley et al.*, 17 F. (2d) 83.

Our Circuit Court of Appeals must be presumed to have had the harmless error statute in mind in adopting the following language employed by Pritchard, J., in *Oxford &c. Rd. Co.* v. *Union Bank*, 153 Fed. 723, 728:

> "While it is not the policy of the Court to dismiss writs of error in cases on appeal on account of slight technicalities, at the same time, the rules of this Court as well as the rules of the Circuit Court are plain and easily understood. In this case the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys

who practice in the federal Courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions."

In the case just quoted from, the trial judge had certified that he ". . . has allowed, settled and signed within the time allowed by law and the orders of the said judge the attached bill of exceptions and hereby orders the same to be filed August 24, 1906. (Signed) THOS. R. PURNELL, U.S. Judge."

But the recital in the opinion shows that there was nothing to indicate to the Circuit Court of Appeals that the judge had signed the "attached bill of exceptions." He had apparently signed only the certificate.

Obviously, our Circuit Court of Appeals adopted the ruling of the Circuit Court of Appeals in the case of *Oxford &c. Rd. Co.* v. *Union Bank*, 153 Fed. 723, 728, which was followed and approved in respect of the indispensable necessity of the judge's signature to validate the bill of exceptions in the case of *Knight* v. *Illinois Central Rd. Co.*, 180 Fed. 368, 371 (C.C.A. 6).

The respondent knows of no circuit that has failed to follow this rule where the question was squarely raised.

It is therefore submitted that the lack of proper attestation by the trial judge upon the so-called bills of exceptions in the instant cases was not mere harmless error, that it was incumbent upon the Court to hold that there was no bill of exceptions before it, and that the assignments of error could therefore not be considered.

C.

The Circuit Court of Appeals did Not Err in Refusing to Permit Amendments to Cure the Defects in the So-called Bills of Exceptions.

It is true that the Circuit Court of Appeals did not, of its own motion, cure the defects which it found in the bills of exceptions.

On pages 4 and 5 of the petition learned counsel for the petitioner complains that in concluding that the lack of a proper judicial signature evidencing the allowance of the bills of exceptions was a substantial defect, the Circuit Court of Appeals ignored "the rule announced and the course followed by this Court in *Mich. Ins. Bank* v. *Eldred,* 143 U.S. 293, and *United States* (*ex rel. Kinney*) v. *U.S. Fidelity Co.,* 222 U.S. 283."

After reading the two cases just cited counsel for the respondent fails to understand the purpose of the petitioner in citing them. In the case of *Michigan Insurance Bank* v. *Eldred,* as counsel for the respondent reads and understands it, the defendant prevailed in the trial Court; thereupon, the plaintiff alleged and tendered exceptions which were duly allowed. The excepting party came to this Court on a writ of error with a bill of exceptions incorporated therein. While the writ was pending here and long after the term of the trial Court had expired, the plaintiff asked the trial Court to allow amendments to the bill of exceptions which had been theretofore duly allowed, and the trial Court purported to allowed said amendments, *nunc pro tunc,* as of the date of the allowance of the original bill of exceptions. Thereupon the plaintiff presented a petition to this Court asking for a writ of certiorari containing a so-called amended bill of exceptions, the writ of error being still before this Court.

This Court said in its opinion:

> "By the uniform course of decisions, no exceptions to rulings at a trial can be considered by this Court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of the Court, or by the consent of the parties; and save under very extraordinary circumstances, they must be allowed by the judge and filed with the Clerk

during the same term. After the term has expired, without the Court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this Court, all authority of the Court below to allow a bill of exceptions, then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end." After further observations the Court proceeds: "The writ of certiorari prayed for must therefore be denied and the case must be determined upon the original bill of exceptions."

While it is true that the Court ordered a new trial, it did so for reasons wholly apart from the attempted amendments to the original bill of exceptions.

In the case of *United States* (*ex rel. Kinney*) v. *U.S. Fidelity Co.*, 222 U.S. 283, this Court said, at page 284:

"As to the contentions which relate to occurrences at the trial, they cannot be considered, as the record contains no bill of exceptions. The paper in the record styled 'exceptions to the charge to jury,' initialed 'J.B.McP., trial judge', and signed by the plaintiff, is not a bill of exceptions (*Origet* v. *United States*, 125 U.S. 240, 243) . . ."

The Court goes on to say:

". . . but if it were to be treated as a bill of exceptions, as all the matters therein referred to depend for their solution upon an examination of the evidence which is not in the record, it follows that we have no means of determining whether reversible error arose from an action of the Court on any of the subjects to which the paper refers."

We assume our learned adversary derives some comfort from the last quotation, which is to be found on page 284;

but since the Court definitely holds "that the record contains no bill of exceptions," we assume that what follows with respect to the absence of any evidence upon which to determine whether there was reversible error in the charge was not by way of qualification of this positive rule, but rather by way of asserting an additional reason for affirming the judgment of the lower Court.

So that, as we read the two cases referred to by our learned opponent, we fail to see that they conflict with any of the respondent's contentions, or wherein they lay down any rule or follow any course which is contrary to any rule or course followed by our Circuit Court of Appeals, in so far as the issues raised by this petition are concerned.

Again, at page 4 of the petition, the petitioner charges that the Circuit Court of Appeals "failed to consider the bearing on the error in question of the statute of 'Harmless Error' or of the statute of 'Amendments' . . ."

The respondent is not prepared to agree that it would have been error on the part of our Circuit Court of Appeals to have ignored these two statutes in the light of its other conclusions, which, we submit, were correct.

The petitioner having emphasized its contention before the Circuit Court of Appeals that the lack of signature was mere harmless error, and the Circuit Court of Appeals having presumably considered the contention, it cannot be accurately stated that the Circuit Court failed to consider the two statutes referred to. Impliedly, if not expressly, the Circuit Court not only considered the statutes referred to, but gave its reasons for not applying them.

The petitioner further complains, at page 5 of the petition, that the Circuit Court of Appeals "erroneously ruled that the amendment necessary to cure the lack of authentication was one of substance, which could not be had after the term at which the judgments were entered had expired."

That the defect was one of substance the respondent believes has been adequately demonstrated.

The Court of Appeals holds in its opinion, 57 F. (2d) 44, at page 47 (Record, p. 269): "It is too late to send the case back for amendment as the term at which the judgments were entered has expired and the District Court has lost jurisdiction of the case.

> "*Exporters* v. *Butterworth-Judson Co.*, 258 U.S. 365.
> "*United States* v. *Mayer*, 235 U.S. 55, 67.
> "*Delaware, L. & W. R.R.* v. *Rellstab*, 276 U.S. 1."

On the authorities just cited by the Circuit Court of Appeals there seems to be virtually no doubt that the so-called bills of exceptions were not amendable after the expiration of the term.

The petitioner, at page 28 of its brief attached to the petition, concedes the general rule to be as stated in *Exporters* v. *Butterworth-Judson Co.*, 258 U.S. 365, 369, but contends that it is not without exceptions.

It is true that in *Michigan Ins. Bank* v. *Eldred*, 143 U.S. 293, this Court says that—

> ". . . save under very extraordinary circumstances, they [bills of exceptions] must be allowed by the judge and filed with the clerk during the same term . . ."

It is assumed by respondent's counsel that these "very extraordinary circumstances" are to be determined, in the first instance, by the Appellate Court to which they are submitted.

The respondent respectfully submits that nowhere on the record before this Court does it appear that there are "very extraordinary circumstances" which entitled the petitioner to relief by way of amendment or otherwise.

The petitioner cited the case of *Michigan Ins. Bank* v. *Eldred*, 143 U.S. 293, in which the doctrine of "extraordinary circumstances" was announced (Record, p. 296). The Circuit Court of Appeals cites that case, and must be pre-

sumed to have considered it in the light, among other things, of the petitioner's desire for an amendment to effectuate the so-called bills of exceptions, notwithstanding the expiration of the term. The Court also appears to have considered the later case of *Exporters* v. *Butterworth-Judson Co.*, 258 U.S. 365, in which this Court, at page 368, affirms *Michigan Ins. Bank* v. *Eldred*, 143 U.S. 293, and quotes therefrom the paragraph in which the doctrine of "extraordinary circumstances" is stated. Obviously, the Circuit Court of Appeals did not find that the lack of authentication was attended by such circumstances as to entitle the petitioner either to an amendment before the Circuit Court of Appeals or to a return of the cases to the District Court for such amendment. It is respectfully submitted that there were no facts, within or dehors the record, which would warrant that Court in finding that such circumstances existed.

After the opinion of the Circuit Court of Appeals was rendered a petition for rehearing was filed, to which the petitioner appears to have attached a document entitled "Request of Trial Judge," which is found at pages 312 and 312½ of the record, as extended; also another document entitled "Certificate of Clerk," which is to be found at pages 308 *et seq.*, also two other documents entitled "Certificate of Counsel" and "Affidavit of Louis B. King," which are found at pages 306, 307, and 308 of the extended record.

If these documents are to receive any consideration by this Court, the respondent desires to comment upon them, briefly.

From the affidavit of Mr. King it clearly appears that the trial judge had stated to Mr. King that he, the judge, desired to correct "his mistake"; Mr. King further observes the existence of a custom in this district "to consider bills signed either in the full name or with initials sufficiently authenticated . . ." The clerk recites portions of the docket, and also refers to the practice observed by Mr. King. The judge states, in substance, that while he attached his initials intending them to have the legal effect of a judicial

signature he acknowledges his "mistake" and absolves counsel from any contribution thereto. The judge further requests that the record be returned "for such correction by me as now within my power to make." The judge suggests that on the facts related by him he believes judgments were not properly entered, but awaits the approval of the Circuit Court of Appeals as to whether he "should strike the judgment entries from the docket as entered by the mistake of the Clerk, sign the bills of exception fully and order judgment on the original verdicts all now or as of August 20, 1930 with respect to signature and September 8, 1930, with respect to judgments."

Nowhere on this record does it appear that the respondent or its counsel had any notice that the documents above referred to were to be filed or that counsel were given an opportunity to reply if they so desired. However, the respondent respectfully submits that, with respect to the so-called practice referred to in the statements of Mr. King and of the clerk, that practice, if it is entitled to recognition as such, contemplates authentications by complete signatures and by initials, indiscriminately.

If such a practice has existed it seems to be sufficient to say that it was in obvious contravention of United States Revised Statutes, sec. 953, U.S. C.A. tit. 28, sec. 776.

It probably requires no authority to support the proposition that a statute cannot be abrogated by practice or usage.

Presumably these documents were attached to the petition for rehearing to persuade the Circuit Court of Appeals that the petitioner should have the relief it desired; but the Circuit Court of Appeals evidently saw no reason for departing from its previous conclusion, and denied the petition. This would seem to be further evidence that the Circuit Court of Appeals was not impressed with the existence of any extraordinary circumstances entitling the petitioner to the relief.

The only additional evidence offered by the petitioner, if it may be so regarded, is in the form entitled "Certificate

of James S. Allen, Clerk," incorporated in the present petition before this Court at page 8 thereof. Again there is nothing to indicate that there was any intimation to the respondent that such document would be filed, or that the respondent was invited to file any counter statement if it so desired. But, as a matter of precaution, the respondent respectfully submits that, in large measure, Mr. Allen's statement is merely cumulative with respect to the so-called practice previously commented upon. It differs from the previous statements in that it contains a list of cases in which bills of exceptions were said to have been authenticated by initials and in that ". . . this practice has never been commented upon, criticized or condemned by the judges of this Court or of said Circuit Court of Appeals so far as my deputies and I can recall."

The obvious answer to Mr. Allen's statement is that the point was never raised "until the above entitled cases were decided." The last quotation is from Mr. Allen's statement at page 9 of the petition.

This Court has said that it will not treat as precedents, nor will it attempt to differentiate, cases in which the precise issue was not raised.

Webster v. *Fall*, 266 U.S. 507, 511.

The petitioner cites *Barber Asphalt Co.* v. *Standard Asphalt Co.*, 275 U.S. 372, to the proposition that bills of exceptions should be amended after the term by addition of the signature of the trial judge where the defect was due to his fault.

The respondent assumes that in those cases in which purported authentications were rejected by this Court, the defect was primarily attributable to the judge.

Origet v. *United States*, 125 U.S. 240, 244.
Malony v. *Adsit*, 175 U.S. 281.
Oxford &c. Rd. Co. v. *Union Bank*, 153 Fed. 723.
United States (*ex rel. Kinney*) v. *U.S. Fidelity Co.*, 222 U.S. 283.

Furthermore, as we read the case of *Barber Asphalt Co.* v. *Standard Asphalt Co.*, 275 U.S. 372, it does not appear to be analogous to the case at bar. It dealt with equity rule 75 *b* which had been promulgated about seven years before that suit began. The Circuit Court of Appeals for the Seventh Circuit had, until that case arose, persistently ignored the rule by directing that evidence in equity suits be reproduced in full. In this case it heeded the objection that the record on evidence, so set forth, did not conform to the rule, and not only refused to consider the evidence, but affirmed the lower Court's decree. This being the first case which arose in that circuit in which the Circuit Court of Appeals invoked the rule, this Court held that the Circuit Court of Appeals went too far in the exercise of its discretion, and remanded the case upon substantial terms payable to the respondent in certiorari.

The case at bar is at law. The violation was of a statute in existence since 1875. The Court held consistently, in cases decided as early as 1887 and as late as 1928 that that statute must be strictly complied with, and that initials, by whomsoever, would not suffice. Moreover, in the two outstanding cases in which that rule was affirmed, the judgments of the lower Court were affirmed without apparent hesitation.

While this Court held, in the case of *Barber Asphalt Co.* v. *Standard Asphalt Co.*, 275 U.S. 372, at page 384, that failure to conform to rule 75 *b* was substantial error, and not mere harmless error, it further held that the Circuit Court of Appeals, sitting in equity, had power to remand the record on appeal for correction even after the term, but only because rule 75 *b* conferred discretion upon the Court to do so. At page 385 of its opinion in that case this Court approves the opinions of the various circuits which had held that the law relating to the effect of the expiration of the term upon appeals in equity does not apply to bills of exceptions at law.

Barber Asphalt Co. v. *Standard Asphalt Co.*, 275 U.S. 372, 385.
In re General Rule 75, 222 Fed. 884 (C.C.A. 6).
Struett v. *Hill*, 269 Fed. 247, 249 (C.C.A. 9).
Sussex &c. Co. v. *Midwest &c. Co.*, 294 Fed. 597, 600 (C.C.A. 8).
See also *United States* v. *Mayer*, 235 U.S. 55, 67.

The petitioner also cites *Taylor* v. *United States*, Advance Opinions of this Court, 1931-1932, page 662, as illustrating a case of extraordinary circumstances.

We agree that that case does disclose such a situation. We respectfully deny that the circumstances in the case at bar bear any resemblance to those in the Taylor case just cited.

In that case, at the request of the Assistant District Attorney, the completion and presentation of the bill of exceptions were postponed from time to time to May 17th, which happened to be a Sunday. Having completed his examination of the bill on May 16, the Assistant District Attorney went with the defendant's counsel to seek the judge's approval, but did not find him. This Court finds on undisputed evidence that "Failing to find him, they agreed to ask his signature on Monday, May 18th. On that day, with the express approval of all parties and in pursuance of the earlier agreement, the judge signed the bill. The considerable delay in settling the bill followed the request of the Assistant District Attorney in charge and was permitted for his convenience."

Nowhere on the record of the instant case does such a situation appear to be made out. The only assent given by the respondent was its original assent to the form and contents of certain alleged bills of exceptions filed on August 8, 1930. To be exact, however, it now appears that the alleged bills of exceptions contained in the record are not the bills of exceptions to which the respondent assented, since the proposed bills to which respondent had assented

were filed August 8, 1930 (Record, p. 7); whereas the bills filed on that date appear to have been amended on motion on August 20, 1930 (Record, p. 7), and without the assent of the respondent (Record, p. 311). In what respect the alleged bills were amended the respondent then had no knowledge (Record, p. 289).

On these undisputed record facts it may, indeed, be doubted whether the assents previously given by the respondent to the bills of exceptions in the form in which they were on the 8th of August, 1930, were effective even for the limited purpose for which they were given.

This Court has said that a stipulation as to the correctness of a bill of exceptions entered into during the term, which is, at best, all that the assent of the respondent's counsel amounted to, does not dispense with or waive a proper authentication by the judge.

Malony v. *Adsit,* 175 U.S. 281.

The point which this Court stressed in the Taylor case, *supra,* Advance Opinions, 1931-1932, page 662, is that counsel agreed, two days before the expiration date for presentation, to present the bill of exceptions for the judge's signature the day after such expiration. No such agreement was made or is contended for in the case at bar. Obviously, the ordinary assent to the form of a bill of exceptions, such as counsel for the respondent gave in this case, does not carry with it an agreement that the judge's signature may be affixed after the term or applied to bills as they may later be amended.

There was nothing to prevent the petitioner from examining the so-called bills of exceptions from August 20, 1930, when they purport to have been authenticated, to the end of the term. Clearly it was the petitioner's duty to see to it that the bills of exceptions filed by it were in proper shape for consideration by the Circuit Court of Appeals. It is submitted that it is not requiring too much of the pe-

titioner to determine whether or not the bills were properly allowed and authenticated before entering them in the Circuit Court of Appeals. Nor can it be said that the petitioner's reliance on the judge and its disappointment at the decision of the Circuit Court of Appeals constitute evidence of extraordinary circumstances such as would be required to take the case out of the rule which this Court has always been reluctant to relax.

Taylor v. *United States,* Advance Opinions, 1931-1932, p. 662.

Respondent's counsel have examined those cases cited by learned counsel for the petitioner on pages 29 and 30 of his brief attached to the petition, which were decided by this Court and which are claimed to be illustrations of exceptions to the general rule stated in *Exporters* v. *Butterworth-Judson,* 258 U.S. 365, 369, set forth at pages 28 and 29 of the petitioner's brief, and as a result of such examination the respondent begs leave to present the following brief comments upon them:

Exporters v. *Butterworth-Judson Co.,* 258 U.S. 365, is a case in which the bill of exceptions was rejected because it was signed after the term.

In *Walton* v. *United States,* 9 Wheat. 651, the bill of exceptions was signed within the term. The question was merely whether the authentication should relate back to the trial.

In *Muller* v. *Ehlers,* 91 U.S. 249, the exceptions were rejected because they were not submitted or signed until after the term and judgment was affirmed.

In *Jones* v. *Grover &c. Co.,* 131 U.S. Appx. cl, the bill of exceptions was rejected and judgment was affirmed.

In *Michigan &c.* v. *Eldred,* 143 U.S. 293, a petition for a writ of certiorari, containing a modified bill of exceptions signed after the term, was rejected.

In *United States* v. *Breitling,* 20 How. 252, the bill of ex-

ceptions was authenticated after the term, but this Court says, in *Muller* v. *Ehlers,* 91 U.S. 249, at 251, with reference to the Breitling case: ". . . it was probably for the reason that, upon the facts stated, the consent for further time beyond the term for the settling of exceptions might fairly be presumed. That case went to the extreme verge of the law upon this question of the practice and we are not inclined to extend its operation."

In *Dredge* v. *Forsyth,* 2 Black, 566, the bill of exceptions was filed and allowed within the term; the issue was simply whether execution should be sealed and allowed before the jury retired.

In *Hume* v. *Bowie,* 148 U.S. 245, the term was extended before its expiration by order of the judge.

In *Davis* v. *Patrick,* 122 U.S. 138, the opposing party consented within the term to extension beyond the term.

In *Waldron* v. *Waldron,* 156 U.S. 361, there was consent within the term to extension beyond the term.

Chateaugay &c. Co., Petitioner, 128 U.S. 544, was a case in which mandamus was granted to compel the judge to settle and sign a bill of exceptions on the grounds that the parties had relied upon an express order during the term. There was compliance with the pertinent rule of the Court, and consent of the plaintiff was inferred.

In *Hunnicutt* v. *Peyton,* 102 U.S. 333, the exceptions were signed within the term.

Thus it will be noted that in every one of these cases in which relief was granted after the term the Court found that the appellee had consented within the term to the postponement of the presentation or authentication of the bill beyond the term; or, the Court had so ordered within the term. The respondent includes in this category the case of *United States* v. *Breitling,* 20 How. 252, because of the interpretation put upon it by this Court in *Muller* v. *Ehlers,* 91 U.S. 249. In all other cases referred to it was either found that the term had not expired or the bills were rejected.

Conclusion.

In conclusion the respondent respectfully submits that the petitioner has failed to show that the Circuit Court of Appeals erred in holding that the bills of exceptions lacked proper authentication and that the defects were fatal, and that they were not amendable after the expiration of the term.

Dealing directly with the reasons for the issuance of the writs of certiorari alleged in the petition at pages 5 and 6 thereof, the respondent submits that they are somewhat vague and to a large extent inapplicable to the facts of these cases.

If the respondent correctly understands the alleged reasons, it submits that Congress has advisedly provided for the requirements of proper authentication of bills of exceptions and for terms of Court.

As to the requisites of proper authentication this Court has spoken in clear and unmistakable language in a series of uniform decisions, the last of which was handed down as late as 1928 and all of which are hereinbefore referred to and discussed.

As to the effect of the expiration of the term upon the jurisdiction of the Court in actions at law, this Court has likewise declared the law in no uncertain language in a long line of well-known cases, some of which have been referred to and discussed in this brief.

It is assumed by the respondent that such legislation and adjudications should not be lightly disregarded; on the contrary, they should be observed by all litigants who invoke the aid of the federal Courts. Such observance alone would conduce to regularity and uniformity of procedure, and would tend to avoid undue protraction of litigation.

To encourage the disappointed litigant, who has ignored such statutory requirements, to complain after the event that violations of them are but harmless errors is to put a premium upon laxity of practice; it is tantamount to nulli-

fying salutary laws, and tends to open the doors to a flood of uncertainty, confusion, and interminable litigation.

The petitioner has cited no case which indicates any lack of uniformity in the interpretation of the two statutes now under discussion.

And, finally, we have here a controversy between private corporations, begun in 1927, thoroughly tried before a jury and involving not over $20,000, including the counter claims of both litigants. The respondent cannot conceive of any question of public importance that is or can be involved.

It is submitted that the Circuit Court of Appeals has dealt with the situation in strict accordance with the mandates of this Court.

The respondent, therefore, respectfully prays that the petition for the writs of certiorari be denied.

Respectfully submitted,
THE A. L. SMITH IRON WORKS,
Respondent,
By its Attorneys,
LOWELL A. MAYBERRY,
ROBERT GALLAGHER,
MARTIN WITTE,
SAMUEL ABRAMS.

TABLE OF CONTENTS.

	Page
I. Brief summary of the facts	1
II. Issues before the trial Court	13
III. Steps in the proceedings from the commencement of the actions to the confirmation of judgment by the Circuit Court of Appeals	19
IV. Issues before the Circuit Court of Appeals	21
V. Steps from the Circuit Court to the Supreme Court of the United States	22
VI. Issues before the United States Supreme Court	22
VII. Inaccuracies in the petitioner's brief	23
Part One	27
Argument of the law	27
I. The alleged bills of exceptions	27
II. St. Feb. 26, 1919, c. 48, now part of U.S. Code, tit. 28, sec. 391	30
III. U.S. Code, tit. 28, sec. 777	34
IV. Amendment after the term	36
V. Appeal as affecting jurisdiction after term	42
VI. The contents of the record	44
Conclusion on this branch of the case	48
Part Two	49
Assignments of error	49
General rule relating to rulings on questions of evidence and refusals of the Court to charge the jury in accordance with specific requests on isolated portions of the evidence	50
Discussion of the assignments of error	51
Assignment No. 1	51
2	53
3	56
4	57
7	58
8	58
10	58

	Page
Assignment No. 11	59
12	59
18	60
19	60
21	60
23	61
24	61
25	61
26	62
27	62
28	66
29	66
30	67
31	70
32	70
33	70
34	71
35	72
36	73
37	74
38	75
39	75
40	76
41	77
42	82
43	83
44	84
45	85
46	85
48	85
49	86
50	86
51	87
52	87
53	87
54	87

Page

Discussion of the assignments of error 51
Damages 87
Conclusion of this branch of the case 88

AUTHORITIES CITED.

Amer. Ry. Express Co. v. MacDermott, 44 F. (2d) 955 73
Amer. Sugar Refin. Co. v. Nassif, 45 F. (2d) 321 52
Barber Asphalt Co. v. Standard &c. Co., 275 U.S. 372 42
Barlow Co. v. Stone, 200 Mass. 158 66, 87
Barrett Co. v. Panther Rubber Co., 24 F. (2d) 329 82
Bird & Son v. Guarantee Const. Co., 295 F. 451 52
Blakeslee v. United States, 32 F. (2d) 15 33, 50, 89
Borden v. Fine, 212 Mass. 425 68
Brown v. Carver, 45 F. (2d) 673 32, 89
Buckley v. Frankel, 262 Mass. 13 50
Chateaugay &c. Co., Petitioner, 128 U.S. 544 38
Cinamon v. St. Louis Rubber Co., 229 Mass. 33 62
Davenport Ladder Co. v. Edward Hines Lumber Co., 43 F. (2d) 63 52
Davis v. Patrick, 122 U.S. 138 38
Delaware Rd. Co. v. Rellstab, 270 U.S. 1 37
Dredge v. Forsyth, 2 Black. 566 38
Evans v. Stettnish, 149 U.S. 605 23
Exporters v. Butterworth-Judson Co., 258 U.S. 365 37
Gascoigne v. Cary Brick Co., 217 Mass. 302 82
General Rule 75, In re, 222 F. 884 42
Gilmer v. Higley, 110 U.S. 47 89
Goetzinger v. Woodley, 17 F. (2d) 83 28
Grimes v. Malcolm, 164 U.S. 483 32, 89
Hanley v. Eastern Steamship Co., 221 Mass. 125 75, 76
Hanson v. Wittenberg, 205 Mass. 319 52
Harding v. Illinois, 196 U.S. 78 47
Harrington v. Stratton, 22 Pick. 510 62
Hawks v. Truesdell, 12 Allen, 564 63, 70

Page

Herbrand v. Lackawanna Steel Co., 280 F. 11 69
Herrick v. Waitt, 224 Mass. 416 50
Hicks v. N.Y., N.H. & H. R.R. Co., 164 Mass. 424 51
Horning v. District of Columbia, 254 U.S. 135 34, 89
Hume v. Bowie, 148 U.S. 245 38
Hunnicutt v. Peyton, 102 U.S. 333 38
Idaho & Oregon Land Co. v. Bradbury, 132 U.S. 512 34
Jackman v. Doland, 116 Mass. 550 63, 70
Jennings v. Phil., Balt. & Wash. Ry. Co., 218 U.S. 255 41, 42
Jones v. Grover & Baker Sewing Machine Co., 131 U.S. Appx. *cl.* 38
Kalanianole v. Smithies, 226 U.S. 463 31, 89
Knight v. Illinois R. Co., 180 F. 368 28
Krauss Bros. Co. v. Mellon, 276 U.S. 386 23, 28, 30, 43, 46, 47
Linen Thread Co. v. Shaw, 9 F. (2d) 17 63
Linton v. Noonan, 238 Mass. 31 56
McDonough v. Boston Elevated Ry. Co., 208 Mass. 436 76
Malony v. Adsit, 175 U.S. 281 28, 29, 31, 36, 39
Matheson's Admrs. v. Grant's Admr., 2 How. 263 36
Michigan Bank v. Eldred, 143 U.S. 293 29, 34, 37, 38, 41
Muller v. Ehlers, 91 U.S. 249 37, 38
Mussina v. Cavazos, 6 Wall. 355 27
Nashua River Paper Co. v. Lindsay, 242 Mass. 206 82
Nickerson v. Weld, 204 Mass. 346 52
Origet v. United States, 125 U.S. 240 27, 28, 39
Oxford &c. R. Co. v. Union Bank, 153 F. 723 29, 31, 35, 39
Pennsylvania Co. v. Olivit Bros., 243 U.S. 574 50, 89
Powers v. Bergman, 197 Mass. 39 76
R.C.N. Mfg. Co. v. Whittaker, 49 R.I. 449; 144 Atl. 158 62, 63
Redmond v. United States, 8 F. (2d) 24 33, 89
Rittenhouse W. Auto Co. v. Kissner, 129 Md. 102; 98 Atl. 361 83
Robilio v. United States, 291 F. 975 32, 89

Page

Rosen v. United States, 271 F. 651 32, 33, 36, 89
Rumsey v. N.Y. Life Ins. Co., 267 F. 554 32, 89
Seaboard Railway v. Moore, 228 U.S. 433 32, 89
Shuman v. United States, 16 F. (2d) 457 32
Snow v. Alley, 156 Mass. 193 62
Star Glass Co. v. Morey, 108 Mass. 570 63
Steen v. First National Bank, 298 F. 36 30
Struett v. Hill, 269 F. 249 42
Sturm v. Williams Oven Mfg. Co., 201 App. Div. 113; 193 N.Y. S. 852 83
Sussex &c. Co. v. Midwest &c. Co., 294 F. 597 42
Taylor v. Cole, 111 Mass. 363 82
Taylor v. United States, 52 Sup. Ct. Rep. 466 42
Taylor v. United States, Adv. Opinions, 1931-1932, p. 662 40
Thorndike, Petitioner, 244 Mass. 429 30
Trimount Lumber Co. v. Murdough, 229 Mass. 254 77, 82, 84, 85
Turner v. Twing, 9 Cush. 512 79
United States v. Breitling, 20 How. 252 38
United States, ex rel. Kinney, v. United States Fidelity & Guaranty Co., 222 U.S. 283 28, 35, 39
United States v. Mayer, 235 U.S. 55 37, 42
United States v. Penn. R. Co., 283 F. 937 32, 89
United States v. Seale, 45 F. (2d) 394 37
Vicksburg &c. Rd. v. O'Brien, 119 U.S. 99 31, 89
Waldron v. Waldron, 156 U.S. 361 38, 40
Water &c. Co. v. City of Hutchison, 160 F. 41 62
Webster v. Fall, 266 U.S. 507 43
West End Co. v. Warren Co., 198 Mass. 320 56, 68
Wilson v. Checker Taxi Co., 263 Mass. 425 30

STATUTES CITED.

	Page
Section 4 of Act of June 1, 1872, c. 255 (17 Stat. 197)	27, 28
Mass. Gen. Laws, c. 106, sec. 38	76
Mass. Gen. Laws, c. 106, sec. 49	68, 78
Mass. Gen. Laws, c. 107, sec. 51	62
St. Feb. 26, 1919, c. 48; U.S. Code, tit. 28, sec. 391 (Judicial Code, sec. 269, as amended)	30, 31, 34, 48, 88
U.S. Code, tit. 28, sec. 777	34

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 228.

GEORGE A. OHL & COMPANY,
PETITIONER,
v.
A. L. SMITH IRON WORKS,
RESPONDENT.

No. 229.

SAME *v.* SAME.

BRIEF FOR RESPONDENT IN OPPOSITION TO WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

I.

BRIEF SUMMARY OF THE FACTS.

George A. Ohl & Company, a New Jersey corporation, petitioner in each case, commenced suit against The A. L. Smith Iron Works, a Massachusetts corporation, respondent in each case, by writ issued from the United States District Court for the District of Massachusetts dated November 17, 1927. The A. L. Smith Iron Works, respondent in each case, commenced suit against George A. Ohl & Company by writ issued from said Court dated December 7, 1927. Declarations and answers were duly filed in each action, and the cases were tried together to a jury at the bar of said Court.

The suit instituted by George A. Ohl & Company will, for convenience, be referred to hereafter as the Ohl suit, distinguishing it from the cause of action sued upon by The A. L. Smith Iron Works, which will be referred to hereafter as the Smith suit. In the Ohl suit the jury returned a verdict for the defendant on May 7, 1929. In the Smith suit the jury, on said date, returned a verdict for the plaintiff and assessed damages in the sum of seventy-five hundred dollars ($7500). The Ohl Company filed a motion for new trial in each case on May 9, 1929, which motions were overruled on May 14, 1930.

On August 8, 1930, a writing, entitled "Substitute Bill of Exceptions on behalf of George A. Ohl & Company," was filed, and this writing contains a notation thereon, "allowed August 20, 1930. J.A.L. D.J."

On May 21, 1930, a writing was filed in the Ohl suit, entitled "Plaintiff's Bill of Exceptions concerning plaintiff's motion for new trial," and this writing contains a notation, "allowed August 20, 1930, J.A.L. D.J."

On May 21, 1930, a writing was filed in the Smith suit, entitled "Defendant's Bill of Exceptions concerning Defendant's motion for new trial," similar to that filed in the Ohl suit, differing only in that the word "defendant" was inserted in place of "plaintiff," and bearing a notation, "allowed August 20, 1930, J.A.L. D.J.," to wit, identical with that set forth in the case in which George A. Ohl & Company was plaintiff.

On September 8, 1930, judgments were entered for the defendant The A. L. Smith Iron Works in the action commenced against it by George A. Ohl & Company and for the plaintiff The A. L. Smith Iron Works in the action commenced by it against George A. Ohl & Company in the sum of seventy-five hundred dollars ($7500) damages, with interest and costs.

In the case of the Ohl suit the plaintiff's declaration contained twelve counts, in each of which recovery was sought

upon a promissory note made by the defendant to the plaintiff as payee.

The defendant The A. L. Smith Iron Works answered, pleading as to each count a general denial, lack of consideration, and failure of consideration. In the case of The A. L. Smith Iron Works against George A. Ohl & Company the declaration set forth that the plaintiff made an agreement with the defendant for the purchase of a machine for use in its factory, where the plaintiff was engaged in the business of manufacturing and installing architectural, ornamental, and structural steel; and manufacturing and installing ironwork; and that the machine delivered was defective, and not in accord with what the defendant had agreed to furnish the plaintiff. The machine was described, and its defects and failures set forth. The defendant George A. Ohl & Company's answer consisted of a general denial and a further answer to the effect that the material called for by the contract was tested, examined, and accepted as conforming to the contract by The A. L. Smith Iron Works prior to physical delivery.

On May 19, 1928, George A. Ohl & Company filed two motions for specifications. In the Ohl suit it moved that The A. L. Smith Iron Works specify in what way there was a failure of consideration. In the Smith case it moved that The A. L. Smith Iron Works specify in answer to certain questions. The Smith Company, as plaintiff, filed specifications, and the parties agreed that such specifications be considered as specifications under Smith's answer in the Ohl suit.

George A. Ohl & Company, hereafter for the sake of convenience referred to as Ohl Company, is a New Jersey corporation engaged in manufacturing different kinds of machines for stamping, rolling, and cutting sheet-metal products from the thinner material up to half-inch thick and from 3 feet long to 12 feet 6 inches long.

The A. L. Smith Iron Works, hereafter for the sake of convenience referred to as Smith Company, has been in

business over thirty years in the City of Chelsea in the Commonwealth of Massachusetts. This Company is engaged in structural steel and ornamental iron business, and at times in special work, buying the raw material in lengths for structural and in bars or sheets for ornamental purposes. It has a plant where the raw material is fabricated. The work performed at the plant is done by machine as much as possible and there is a constant effort to diminish the amount of work done by hand, due to the expense of that type of work. The Smith Company, as the larger part of its business, fabricates and installs stair stringers, stair treads, and stair risers, principally in the larger buildings being erected in the vicinity of Boston. This type of work, as is commonly known, is constructed according to specifications and architectural drawings indicating the precise type of material, method of construction, and detail of construction that is required. Among the matters commonly so prescribed are the dimensions of such materials, the incline of the stairway in question, and other factors necessitating the construction of metal; so that in its installation it becomes a part of the other metal work in such building. These circumstances require the metal work made and installed by the Smith Company to have and retain a certain fixed angle and the material as furnished must retain that angle. Stair stringers are always bent to a predetermined angle, usually 90 degrees, which such stairs must retain.

The machine the subject-matter of this litigation was purchased to form stair stringers, treads, and risers for the Smith Company. The structural steel plates used by the Smith Company in connection with that type of work herein described were purchased under thickness or gauged specifications, usually rated from $\frac{3}{8}$ inches in thickness to lesser thicknesses. All the facts alleged with respect to the business of the Smith Company and the type of work that it was expected that said machine would do and for which it was

purchased were well known to the Ohl Company long prior to the consummation of the contract sued upon.

The machine in question is a ponderous one, weighing in excess of 108,000 pounds, measuring 12 feet 6 inches in length and over 10 feet in height. Its installation in the plant of the Smith Company required the laying of a substantial foundation, a rearrangement of the plant of said Company, and was attended with considerable expense.

Mr. Smith informed Mr. Ohl about the respondent's need of a machine to form steel some two or three months before the machine was ordered and of Smith's desire to secure a machine to form stair material in one operation (R. p. 19). Smith told Ohl that he wanted a 12'6" press and that he had never had any experience in making machines, but that he wanted a machine strong enough to bend ⅜" plate (R. p. 53). A week or two later Smith again saw Ohl and Ohl told him that, if the machine did not bend ⅜" material, Smith could have the machine for nothing (R. p. 17).

On November 24, 1925, Smith wrote Ohl placing an order for a 12'6" power press of ⅜" capacity (Exhibit B). By letter of January 12, 1926, Smith requested Ohl to manufacture a set of dies to form material at 90 degrees, the full length of the machine, for use upon such machine (R. p. 20).

On February 2, 1926, the Ohl Company informed Smith that the press would be ready in about two weeks (Exhibit S). On February 19, 1926, Smith and Mr. Hovasse, a mechanic in the employ of the Smith Company, went to the Ohl factory, where a riser and tread of ⅛" thickness was made, about 5 feet long (R. pp. 58-60). Mr. Smith left Mr. Hovasse at the plant, and the latter asked that a piece of ⅜" steel be bent. No one piece 12 feet 6 inches in length of ⅜" steel was bent. Three pieces bent at the same time averaged about 4 feet each, and were bent in one operation, but not of ⅜" steel. The Ohl Company did not have a ⅜" steel, and they finally made a piece by plating on one side to bring thickness (R. p. 59). The type of steel used that was bent in this oper-

ation was coppered-back steel, and not the kind of steel used for stringers, but Hovasse did not notice that fact nor was it called to his attention (R. p. 82). On February 25, 1926, Ohl had Hovasse sign an acknowledgment (Exhibit RR) that he had tested the machine and that everything was found satisfactory (R. p. 60). This is the writing that is referred to by the Ohl Company in its answer in the Smith suit as an acknowledgment of performance.

On March 3, 1926, Ohl wrote to Smith (Exhibit W) notifying Smith of shipment of the machine and saying that he had tested out the press *thoroughly* (italics ours) before shipment and felt confident that Smith would be well pleased with it. A memorandum of agreement (Exhibit A) dated March 1, 1926, was sent to Smith for signature, and was signed with a rider attached, as follows (R. p. 11):

> "Newark, New Jersey,
> March 9, 1926.
>
> We hereby guarantee that the 12'6"-103,000 pounds power press has a capacity as stated in our specifications of said Press, namely, 3/8" soft steel on steel dies, the female of which measures 3" across the corners, and that the material and workmanship are of the best.
>
> GEORGE A. OHL CO."

These specifications were somewhat lengthy, and among other provisions contained the following (R. pp. 48-51):

> "This machine has been built to meet the demand for a machine which will bend the heavier gauges of metal with ease and you can also *bring out in fine detail, multiple bends which cannot be successfully accomplished in the lighter machines of this class.* . . . [Italics ours.]
>
> "The main or eccentric shaft 8" in diameter, is a high carbon steel forging, and is driven at both ends by large cut gears, thus preventing all twist of the machine under the heaviest strains and adding greatly to the

smooth operation when worked to its fullest capacity. . . .

"This power adjusting motion is protected by our patented friction frog gear marked 'B' on enclosed blueprint, which is adjusted that it will just lift the weight of the slide or hammer, and if the operator adjusts the slide down hard on the dies or up to the extreme limit, this gear will slip and no damage will be caused. . . .

"The main driving clutch is 25" in diameter with its clutch cheeks fitted with hardwood inserts, so that it will not 'cut' and at the same time carry the full capacity of the machine without slipping. . . .

"The bed or bottom piece also has a very heavy rib at the bottom and truss ribs are also provided, guaranteeing a construction which will not spring under the heaviest pressure it is subjected to. . . ."

The machine was set up in the plant of Smith Company and representatives of the Ohl Company admitted that the foundation and the machine were properly installed (R. p. 173). The press was first operated by the respondent on or about April 15, 1926, and rendered unsatisfactory service from the outset.

On June 25, 1926, the Smith Company wrote to the Ohl Company (Exhibit CC, R. p. 30) complaining about the machine and ascribing the trouble to the "fly-wheel bearing and disc getting hot." This letter inaccurately fixed the site of the trouble, although written in good faith. Ohl understood, however, that the real location of the trouble referred to was the "fly wheel shaft" (R. pp. 82-83, and Exhibit DD, p. 31).

Up to that time the Smith Company had not tried any 3/8" steel bending or forming in the machine, and the trouble experienced up to that time had resulted from work on lighter material. Ohl, on June 28, 1926 (Exhibit DD), simply told Smith to keep the machine oiled.

On August 13, 1926, Smith wrote to Ohl (Exhibit EE) that the machine would not perform in accordance with the specifications and the guaranty made by Ohl, and informed Ohl that what Smith wanted was a workable machine to facilitate production, and not controversy.

On August 16, 1926 (Exhibit FF), Ohl wrote to Smith telling Smith to have the machinist take off the fly-wheel, clean out the dirt, and lubricate with a good machinery oil.

On August 20, 1926 (Exhibit HH), Ohl wrote to Smith that the Boston Engineering Company reported that there was a "play in the shaft caused by the thrust rim being worn which part has to be renewed."

On August 23, 1926, Mr. Witte, counsel for Smith Company, wrote Mr. Ohl's counsel, Mr. Shannon (Exhibit II), informing him that the machine would not bend 3/8" metal without a material deflection, so that when Smith succeeded in bending a given piece of 3/8" it required a lot of man power after each operation to recover the metal from deflection. A suggestion was made in this letter that such changes be made in the machine as would be deemed essential to its proper operation in accordance with the agreement between the parties.

On August 25, 1926, Mr. Hovasse sent Ohl (Exhibit JJ) a letter informing him that he found that the 16" bushing "in housing number 2 was a poor, loose fit and turned around. The one brass roller retainer was broken in three pieces, with only two screws in the other, etc." He also informed Ohl that the machine would be down on the following Thursday and Friday while repairs were being made, and suggested that a man be sent by Ohl to see the machine, since "seeing is believing" (R. p. 38).

On August 26, 1926, Ohl wrote to Smith (Exhibit KK) again reiterating that any faults in the machine were due to improper oiling or lack of proper foundation under the press.

On August 28, 1926, Ohl sent to Mr. Witte, counsel for Smith, a letter (Exhibit LL) informing Mr. Witte in substance that any fault of the machine was due to improper operation by Smith, and that Ohl did not propose to furnish brains or keep the press in repair.

On September 3, 1926, M. Witte wrote to Ohl that, despite the tone of Ohl's letter, Ohl might have the opportunity of putting the machine in the condition which would approximate the warranty of Ohl (Exhibit MM, R. p. 40).

On September 8, 1926, Ohl wrote to Mr. Witte (Exhibit NN) informing him that there was no press in the world which would not deflect, and that Ohl did not believe that he knew the first thing about the trouble, and would go the limit against him (R. p. 41).

On September 14, 1926, Ohl wrote to Smith (Exhibit OO) informing Smith that other customers of Ohl were not complaining about their machines and that Smith did "not have a leg to stand on" (R. p. 42).

The Ohl Company contended in its correspondence and throughout the trial there was nothing wrong with the press sold by it to the Smith Company and that the materials and workmanship were of the best, and that any defects found by the Smith Company in the operation of the machine were due to negligent and improper operation by the Smith Company. Smith, on the other hand, contended that the machine could not do the work that Ohl agreed it would do, and that the machine, in its practical operation, was defective and not in accordance either with the specifications and guaranty of Ohl, or with the understanding of the parties as to the type of machine needed by Smith and which Ohl agreed to furnish, nor would it turn out proper products.

Smith testified as to the type of business conducted by The Smith Iron Works. Smith told Ohl how he wanted the work done so as to save cost and how the Smith plant did the work prior to that time. Ohl undertook to tell Smith that he could build a machine or anything Smith wanted, and that

Smith could rely upon his skill and ability. Smith informed Ohl that he wanted a machine that would bend material without getting it out of shape, in accordance with his specifications, up to ⅜", 12 feet long, and Smith understood that he was to get something suitable for the work that he described to Ohl (R. pp. 15-17; 145 *et seq.*).

Charles J. Hovasse, a master mechanic, testified that Smith started to operate the machine on April 15, 1926, and had trouble from the start in that the 16" bearing had turned around in the housing though the bearing was not supposed to revolve. The witness's testimony is that he put the bearings back with sufficient screws so that they would not turn loose again, but even after that the machine gave trouble and had to be shut down several times a day to cool off (R. p. 62).

On August 19, 1926, the Boston Engineering Company started to take part of the machine down, and some time after the Boston Engineering Company returned the material taken, Mr. Hovasse found a big blow hole in the casting where the 16" bushing goes in. Later, there was some complaint that the clutch that raised and lowered the hammers for adjustment on the machine gave a lot of trouble (R. p. 63), and that the material worked on the machine was bowed in such a way as not to be a commercial job, and required that the material worked in the machine be hammered or peened by hand to make it straight, peening meaning a continuous hammering at short spaces (R. p. 64). According to the witness, this bowing was due to the sinking or sagging of the center of the bed of the machine which he had noticed down at Newark and which he had been told by Ohl was due to the temporary support in the Ohl plant.

When Mr. Kolarsy, a representative of Ohl, came to the Smith plant, on September 1, 1926, he was shown the machine by Mr. Hovasse and informed of its defects. Mr. Kolarsy admitted that the machine was set up properly in the Smith plant and he made no suggestion that the machine had been improperly oiled. After Kolarsy's visit, Professor

Townsend and Professor Swett came to the plant and made observations concerning the machine. While they were there, a piece of 3/16″ material was bent. A 90-degree die, 12 feet long, was being used, and the bed of the machine bent down 65/1000 of an inch. The professors wanted to take a new reading, so Hovasse instructed the operator to make another bend. He did so, and the machine broke on the right-hand housing at two places in the housing or stanchion (R. p. 67) (Exhibit BBB, Photo). After the stanchion broke, it was repaired by making steel yokes over the top and putting in large 3″ bolts to hold it together (R. p. 68) (Exhibit TT, Photo). Other repairs were necessary to a firm holding. Because of the repairs some 18 inches in the usable length of the machine were lost, and the bars used to repair it narrowed the housing (R. p. 68).

The correspondence between the parties with respect to the alleged defects and insufficiencies of the machine was introduced in evidence without objection. Some of this correspondence was introduced by Ohl and some by Smith.

Other witnesses corroborated the testimony of Mr. Hovasse in regard to the deflection in the bed of the machine and the existence of the bowing as well as in regard to the unworkmanlike qualities of the machine (Robert Dunlop, R. p. 84; John E. Carron, R. p. 85).

Arthur L. Townsend, a professor at the Massachusetts Institute of Technology, testified that the machine did not have the capacity and could not perform the quality of work called for by the rider attached to the express warranty. He testified that the factor of safety in this machine was about 2½, which was "altogether too low in machines of this general type, which should run from 6 to 10 or 12 with 7 as a fair average" (R. p. 95). He also testified that in machines such as this, commonly sold in the market, there were safety devices, and that there was no safety device in this machine, and that the machine was not properly constructed, because of the absence of an efficient safety device (R. pp. 96-97). He

said the bowing existing in the machine was "very unworkmanlike and a very unreasonable amount of bowing" (R. p. 96).

Fred Perkins, a manufacturer of power presses, in business thirty-five years with the Perkins Machine Company, at Warren, Massachusetts, testified that the factor of safety in that machine was not sufficient to bend ⅜" steel without danger of eruption, nor was it capable of bending even as much as ¼" steel (R. p. 114). He also testified that the machine was of poor material and of poor construction (R. p. 114), and the efficiency of the machine was greatly reduced by the fact that the base was not given sufficient material, and that there was a large hole in the center of the bed which greatly weakened the cross-section; also an oblong hole in the center of the base, which did not appear in the prints (Exhibit 14, R. p. 116). It also appeared from his testimony that the machine was not properly designed to have a common factor of safety (R. p. 122).

J. F. Dailey, who was the first witness for the Ohl Company, testified that he was an attorney and went down to the Smith plant as an investigator. He said that he did not give his name, address, or business, but lied, and said that he wanted a sample piece of track. He testified as to a conversation that Mr. Simpson, an employee at the Smith plant, had with another employee, and then admitted that he did not know that he heard that conversation, and the Court struck out all his testimony as to what Simpson said (R. pp. 123, 124).

The Ohl Company called various other witnesses in an attempt to contradict the testimony offered by the Smith Company. Among them was George A. Ohl, president, treasurer, and sole stockholder of the Ohl Company. He testified as to conversations he had with Mr. Smith relative to the ordering of the machine, and described the machine (R. p. 147). On cross-examination he testified that his clutch was the safety device (R. p. 149); that he understood that Mr.

Smith never intended to use the machine for more than ¼" metal in bending (R. p. 160), and did not say anything to Hovasse about the copper plate on the ⅜" material that was used for a test in the plant at Newark (R. p. 163). The witness testified further that he had furnished his counsel with notes at the cross-examination of Hovasse with respect to the foundation which Hovasse constructed for the Smith machine; that there was no claim now that the foundation constructed by Hovasse for the machine in question was improper (R. p. 173). He also testified that the machine was not built strong enough to set ⅜" material (R. p. 184). On recross-examination he testified, in respect to Exhibit RRR, the United States Army Ordinance Department material specifications, June, 1924, that for heavy castings the tensile strength minimum is 30,000 pounds per square inch, and that he did not have a test made of the strength of the casting used in the machine in question (R. p. 206). Harold C. Mann, called by Smith in rebuttal, testified that he was a research engineer for the Watertown Arsenal of the United States Government, and tested specimens of the machine, which test revealed that one specimen had 25,600 and the other 26,800 pounds per square inch tensile strength, and that these specimens came from the outside of the machine, and that he "wouldn't want to figure that much over 20,000 to 22,000 for a general average" (R. p. 209). He also testified that the specifications of the Government are not considerably higher than those in the cast-iron trade, and that the specifications were patterned after the trade presses and very closely to the latest A.S.T.M., the American Society for Testing Materials (R. p. 210).

II.

Issues before the Trial Court.

One of the clear-cut issues between the parties was whether or not the machine in question deflected unduly,

causing bowing. To illustrate: If a 12′ piece of material were inserted in the press and the press operated, the work, upon examination, would show that it was out of alignment and the center had sagged. This material was spoken of, at the trial, as bowed material. This bowing was due to the depression of the press in that area upon which the middle of the material rested, and this malperformance of the press was spoken of as deflection. This alleged vice was specified by the Smith Company in the latter's specifications under paragraph 3 (*d*) and paragraph 4 of said specifications (R. pp. 8-9), paragraphs 5, 6 (R. p. 9), paragraphs 11 (*b*), 11 (*c*), 11 (*d*) (R. p. 10).

The claim of the Smith Company from the time that the deflection became observable was a consistent one, namely, that the bowing or deflection was so marked that hand labor had to be performed in peening the metal in order to conform it to the proper shape. In short, the respondent contended that the material formed in the Ohl machine was not then in merchantable form, and the bowing had to be corrected by hand labor. In support of this claim, in addition to the testimony of Smith and Hovasse, Professor Townsend also testified categorically without objection that in his opinion such result was very "unworkmanlike" (R. p. 97).

The petitioner's attitude with respect to this unsatisfactory performance of the press varied during the period under review.

Ohl first asserted that "there was no press in the world" which would not deflect (Exhibit NN, R. p. 41). Ohl's counsel implied by his examination of Hovasse that the deflection was caused by the faulty foundation constructed by the Smith Company upon which to place the press in question. Ohl admitted that the press deflected at his plant, but ascribed it to the temporary foundation upon which the press was placed at the Ohl plant. Ohl then in his testimony affirmed that there was not any deflection in his machine when it was shipped (R. p. 8) (R. p. 154).

In Ohl's cross-examination he admitted that he had inspired the cross-examination of Hovasse wherein it was attempted to elicit from the latter evidence of faulty foundation to account for deflection, but Ohl then abandoned the claim that the foundation constructed by the Smith Company was improper in any respect (R. p. 173).

Finally, Ohl took the position that there was always some bowing of material bent in the middle (R. p. 184).

The pieces of material that had indisputably been formed upon the Ohl press were produced in court and marked as exhibits and showed marks of peening necessarily performed to correct bowing. Peening, as used at the trial, referred to manually hammering the material for the purpose of curing improper alignment (R. p. 184).

Bowing has no relation to the angle at which material is bent, but has to do with the lack of alignment of material after the bending process has been completed. The crude material used in the press in question when inserted is unbent, but is in alignment, and the machine contracted for was one which would bend it properly without creating any lack of alignment.

Finally, therefore, as the parties were left, it was admitted that there was bowing caused by deflection of the machine which the Ohl Company said did not impair its merchantable qualities nor constitute an unworkmanlike job, nor impose upon the Smith Company any burden of correction; while the Smith Company asserted in each respect the contrary. This issue was submitted to the jury in this succinct manner: "Would this machine bend the iron in a proper way to turn out merchantable stair treads, risers and stringers" (R. p. 219).

Another major issue in the case was whether or not this machine formed material in a workmanlike manner, as it was warranted to form. The machine was designed and purchased to bend a flat sheet of steel at a predetermined angle upon dies. The only angle contemplated by the parties was

a right angle, as shown by the fact that the measurements of the angle are controlled by the dies, which were all right-angle dies, and as shown by the testimony of the superintendent of the petitioner (R. p. 141). The stair stringers were to be formed for erection upon ironwork in large buildings in Boston and vicinity. This was a matter of common knowledge, and was not disputed. Obviously any variance from 90 degrees in a given stringer would make it impossible for the employment of that stringer in the construction of stairs. If the bending process could not produce a sharp-cornered 90-degree angle, the product could not be used as stairs or stringers. Commercially this operation of so forming metal is known as "bending." It was a claim of the Smith Company that the machine in question would not sufficiently compress material as to leave it bent 90 degrees. There was evidence that in bending the metal it was apt to "spring," so that sufficient force must be exerted in bending metal to the desired angle to eliminate this "spring."

Ohl finally took the position that his press would not form the material; that it was not built strong enough to set ⅜" material (R. pp. 48 and 184).

In other words, petitioner contended that all the machine was required to do was to bend metal ⅜" thick or less irrespective of the extent of the bend or shape of the product after the bending process. But his superintendent in the course of his testimony definitely showed that "forming" the metal to a 90-degree angle or to the desired shape was the ultimate object of the bending process (R. p. 141).

Another major issue of fact related to whether or not the machine in question had a proper safety device. The Smith Company contended that there was too low a safety factor and that the machine had no safety device. It appeared from the testimony of Professor Townsend that machines similar to that sold, when marketed, had safety devices (R. p. 96); that friction clutches were not satisfactory as safety devices (R. p. 97); and that the particular machine as con-

structed without a safety device was not of proper construction (R. p. 97). It was the early contention of the Ohl Company that there was no requirement that the machine in question should have a safety device. It appeared, however, that in the Ohl specifications there was reference to a "patented friction frog gear" that was so adjusted that, if a maladjustment was made, a gear would slip and no damage would be caused (R. p. 48). Ohl testified that certain directions were given to purchasers for setting up his presses (Exhibit X), and that, anticipating maladjustments, certain information was imparted for correcting a stalling of the machine (R. p. 156). Ohl testified as follows: His clutch was the safety device (R. p. 148). The machine would not be a proper machine if it had a claw clutch or open clutch or any positive clutch. "XQ. 49. And if it did not have some safety device, in this case a peculiarly, adapted clutch, it would not be a proper machine? A. Yes just the same" (R. p. 158). Again Ohl testified that the 25" diameter friction clutch is a safety device, the best known in mechanics among positive clutches (R. p. 148).

Thus the parties were in agreement that a safety device was a necessary part of the machine, and, in effect, that this machine was not equipped with such a device, although Ohl also contended that his friction clutch constituted a safety device. In other words, as the judge says: "Whether a safety device of some kind was necessary and whether this clutch amounted to a safety device in that it would slip if it was properly adjusted" (R. pp. 218-219).

Another main issue between the parties was whether or not, because of the lack of safety device, and other infirmities, the machine in question broke. At the time the machine broke it was being employed to bend material imposing on it less stress than its warranted capacity (R. pp. 93-94). Therefore it was not improper operation that caused the break. Nor could the break be ascribed to the failure properly to operate what Ohl alleged to be his safety device, the

clutch. Ohl conceded that the break was not due to any failure to adjust the clutch, it being set with such precautions as Ohl said were sufficient. The clutch was adjusted by the "trial and error" method. Carron, the Smith Company's operator, so testified (R. p. 85), and Ohl testified likewise (R. p. 149). (See also R. pp. 164-169.) Or, as the judge said to the jury: "It is for you to say whether it broke under a fair trial or whether at the time that it broke it had an improper load put on it or whether the machine was operating improperly" (R. p. 219).

The Smith Company presented irrefutable testimony that, because of its peculiar construction, the machine was incapable of withstanding the stress imposed upon it at the time of the break.

There were many other imperfections in the machine in question claimed by the Smith Company which were made the subject of complaint by them and are referred to in the specifications of the Smith Company. So far as these troubles were concerned, the parties were not in dispute that they had occurred. A careful check-up by the Ohl Company showed that they existed, and moreover the correspondence of Mr. Ohl affirmed their existence. In these matters the sole dispute was this: Whether, as the Ohl Company asserted, the troubles were due to failure to properly lubricate or not. There was affirmative, convincing proof by way of testimony produced by the Smith Company that lubrication had been carefully attended to. The contentions of the Ohl Company were summarily disposed of by an expert who examined the machine for them with a view to clear up one of the causes of trouble. The Boston Engineering Company was employed by counsel for the Ohl Company to examine the machine in question at the request of the Ohl Company (R. pp. 92-93). In consequence of this employment an expert machinist of the Boston Engineering Company went to the Smith Company plant and dismantled the clutch assembly. He testified that he found it "well lubricated" and that "There were a lot of flaws in it" (R. p. 84).

It is undisputed that no attempt was made to bend the heavier stock until after the Boston Engineering Company restored the clutch late in August, 1926 (R. pp. 88, 92); that there are seasons for the formation of the various thicknesses and their uses as stairs, treads, and stringers (R. p. 63).

A defense specially pleaded was that there had been an acceptance by the Smith Company of the machine in question as "a proper delivery in satisfaction of the defendant's obligation prior to the physical delivery thereof by the defendant to the plaintiff." The incident referred to occurred when a mechanic employed by the Smith Company was presented at the Ohl plant to receive instructions as to the manner of operating the machine in question. He was not there for any other purpose. At that time, as Ohl admitted, the machine was never operated upon a 12'6" piece of material; nor was it operated upon a ⅜" thick steel sheet; nor was it operated on the prescribed dies; nor was it operated on a permanent foundation. Admittedly, at that operation the machine was not being subjected to the stresses which would be imposed by the extreme warranted performance (R. p. 163).

III.

Steps in the Proceedings from the Commencement of the Actions to the Confirmation of Judgment by the Circuit Court of Appeals.

The original writs in the cross-actions between these parties were brought in the latter part of 1927 (R. p. 229).

The action by the Ohl Company (petitioner) was based on a series of notes representing the balance of the purchase price of a machine which it had sold to the Smith Works (respondent) (R. pp. 1-2).

The action by the respondent was based on breaches of warranty, express and implied, under which said machine was sold (R. pp. 230-233).

The answer to the action on the notes was a general denial, lack of consideration, and failure of consideration (R. p. 3).

The answer to the action on the breaches of warranty was a general denial and acceptance of the machine (R. p. 233).

The respondent, in compliance with the requests of the petitioner, filed certain specifications of defects in and failures of the machine to function as the parties intended it should (R. pp. 8-11, 233-235).

The actions were tried together before a jury in April and May of 1929, and the trial consumed about three weeks (R. p. 4).

In the action by the petitioner the jury returned a verdict for the respondent. In the action by the respondent the jury returned a verdict for the respondent in the sum of $7500. These verdicts were returned on May 7, 1929 (R. pp. 5, 236).

On May 9, 1929, the petitioner filed a motion for a new trial in each case.

In the action brought by the petitioner the motion was specifically confined to certain alleged misconduct of one or more of the jurors and to "the verdict as it concerned the defendant's damage" (R. pp. 5, 206, top).

In the action brought by the respondent the petitioner's motion was confined to the same grounds except that the word "plaintiff" was substituted for the word "defendant" (R. pp. 236-237).

These causes were thence continued from term to term to the March term, 1930, *i.e.*, May 14, 1930, on which date they were set down for hearing and overruled (R. pp. 6, 237).

On August 8, 1930, a writing was filed entitled "Substitute Bill of Exceptions on Behalf of George A. Ohl & Company," and this writing contains the notation: "Allowed August 20, 1930, J.A.L. D.J." This paper was expressly made applicable to both cross-actions, and so treated (R. pp. 7, 238).

Near the bottom of page 2 of the petition for certiorari it states that "the trial judge, in counsel's presence, examined the bills and orally allowed them." If material, the respondent points out that this statement does not apply to respondent's counsel; since the filing of its petition the petitioner addressed a communication to the clerk of this Court disclaiming any inference that the respondent's counsel was present on that occasion.

On September 8, 1930, judgments were entered as follows: For the respondent in the action by the petitioner; and for the respondent in the sum of $7500 in its action against the petitioner (R. p. 238).

Petitions for appeal were filed and allowed November 25, 1930 (R. pp. 227, 239).

The clerk of the District Court certified the appeals on January 22, 1931 (R. p. 263).

The cases came on to be argued before the Circuit Court of Appeals on October 22 and 23 of 1931 (R. p. 263).

On March 22, 1932, the Circuit Court of Appeals rendered its opinion affirming the judgments of the District Court, with interest and costs (R. p. 269).

IV.

Issues before the Circuit Court of Appeals.

(1) The respondent's motion to expunge the so-called bills of exceptions for that—

a. they were not properly authenticated;

b. they failed to incorporate all of the material evidence;

c. the statement therein that they contained all the material evidence was inconsistent with other portions of the transcript (R. pp. 11, 224-226).

(2) Assignments of error during the trial.

V.

Steps from the Circuit Court to the Supreme Court of the United States.

In the October term, 1932, the petitioner filed in this Court a petition for a writ of certiorari and on October 17, 1932, said petition was granted.

While the transcript of record filed with the petition for the writ of certiorari contained the petitioner's petition for rehearing addressed to the Circuit Court of Appeals, it appears to be omitted from the record prepared by the clerk of this Court, presumably with the approval of this Court.

VI.

Issues before the United States Supreme Court.

In its present brief, at page 1, the petitioner divides its arguments under two general heads, *i.e.:*

a. "The technical questions of the allowance of the bills of exceptions."

b. "The merits of the exceptions."

The respondent submits that, in view of the fact that the Circuit Court of Appeals has confined its stated grounds for the affirmation of the judgments to the lack of proper bills of exceptions and to its refusal to permit any amendment of them, the original assignments of error and all papers filed by the respondent after the opinion and mandate of the Circuit Court of Appeals were properly omitted from the record before this Court and are therefore irrelevant to the true issues now before the Court.

However, out of abundance of caution, the respondent will discuss all issues now raised by the petitioner, subject, however, to certain inaccuracies in the petitioner's brief and other papers filed by it which will be pointed out under appropriate captions.

VII.

Inaccuracies in the Petitioner's Brief.

1. At page 1 the petitioner states: "The bills were assented to." The fact is that the bills were amended after the respondent assented to them, and that the amendment was not assented to (R. p. 6). See also petitioner's unqualified admission of this fact at page 19 of its petition for rehearing addressed to the Circuit Court of Appeals and annexed to the transcript of record accompanying its petition for writs of certiorari.

2. At page 2 of its brief the petitioner, relying upon a "certificate" of the clerk of the United States District Court appearing at page 8 of the petitions for certiorari, states: "He [the trial judge] followed a long established practice at least tacitly approved . . . by the Circuit Court of Appeals for the First Circuit." That so-called "certificate" does not appear to be part of the transcript of record either in the Circuit Court of Appeals or in this Court, see *Evans* v. *Stettnish*, 149 U.S. 605; *Krauss Bros.* v. *Mellon*, 276 U.S. 386. It is difficult to see how the clerk of the District Court can be said to be authorized to reflect the attitude of the judges of the Circuit Court of Appeals. In any event the learned clerk has not presumed to go so far as to say that that Court "tacitly approved the so-called practice."

3. The petitioner states at page 2 that the Circuit Court of Appeals "refused to consider the merits of the appeal . . ." While that Court apparently rejected the so-called bills of exceptions, it does not follow that it did not consider their merits.

4. At page 11 the petitioner states: "The mistake was not that of a litigant . . ." The respondent suggests that it was, at least, incumbent upon the petitioner to see to it, punctually, that the proposed bills of exceptions were properly disposed of rather than to rely upon a conference "with a deputy clerk concerning appeal procedure" wherein counsel

was incidentally "told that the judge had allowed the bills" (Petition for Rehearing, p. 6, attached to the transcript of record accompanying the petitions for the writs of certiorari).

5. On page 23 the petitioner asserts: "The assent [of the respondent to the proposed bills of exceptions] continues until all that is necessary is done to give the bills their intended legal effect. . . ." Quite apart from the fallacy of that statement as a legalistic argument it seems unfortunate that the petitioner should now attempt to convert an act of courtesy on the part of the respondent in thus aiding the petitioner and the District Court in settling the form and contents of the proposed bills into a consent to the allowance of them within or beyond the term or irrespective of contingencies which obviously were not in the minds of counsel for either party. That seems to be stretching the ordinary formal consent to the contents of a proposed bill beyond the bounds of fair play. Neither the language of the consent nor the circumstances attending it warrant such a statement.

6. At page 24 (top) the petitioner states that the Circuit Court of Appeals "held that both it and the District Court were without power now to amend or to correct a 'harmless error'." The phrase "harmless error" is there quoted. Nowhere in the opinion of that Court is that phrase employed. Nor does that Court hold or imply that the lack of authentication was mere harmless error. On the contrary, the Court held that it was dealing with a case which showed an obvious lack of compliance with an Act of Congress as distinguished from a case of "slight technicalities" (R. p. 268, Opinion of the Circuit Court of Appeals).

7. At page 26 the petitioner states: "The course followed was . . . condoned by this very Circuit Court of Appeals." Respondent assumes that no action or inaction by the Circuit Court of Appeals can possibly change the existing law; but even were that possible, there is no justification for the

quoted statement anywhere in the record. It is, moreover, a reflection upon that Court which it has no means of rebutting otherwise than to deal promptly and effectively with the question when it is presented, as it did in this case.

At page 24 and in the footnote thereto the petitioner refers to a stipulation relating to certain exhibits which the parties stipulated might become part of the record before the Circuit Court of Appeals. Without intending to repudiate that stipulation or to comment upon its legal effect at this time the respondent respectfully invites a comparison between copies of photographic views of various parts of the machine appearing in the bound volume and the originals of said exhibits now in the hands of the clerk of this Court. A merely casual inspection will disclose the accidents that can be wrought by photography. The respondent refers to all of these exhibits, if they be competent, but particularly to Exhibit BBB.

At page 29 the petitioner states that Smith "wanted the machine . . . for the purpose of manufacturing steel stairs." The references to the record include treads, risers, and stringers. The distinctions are obvious. Stringers are ordinarily several times as long as treads and risers. These lengths played an important part in the issues of fact before the jury (Statement of Facts and Issues, *supra*).

At page 29 the respondent speaks of "a formal written contract" being contemplated. The reference at page 21 of the record is to "our [petitioner's] regular agreement," which is set forth at page 11 of the record.

At page 31 the petitioner states that "it was admitted that the complaint of June 25 was an error . . . and described a condition which did not exist." But the petitioner neglects to inform the Court that the error was purely inadvertent and consisted merely of describing the site of the difficulty as "fly wheel bearing," whereas what was intended was "fly wheel shaft," and that the petitioner clearly so understood immediately on receipt of the complaint. Exhibit CC (R. p.

30) is the respondent's letter which refers to the "bearing"; Exhibit DD (R. p. 31) is the petitioner's reply, written three days later, and takes it for granted that respondent's letter refers to the "shaft" (see also R. p. 80; also petitioner's present brief, p. 58).

At page 32 the petitioner states: "they [certain experts whom the respondent called in] caused the press to break." The record reference, R. 94, fails to justify such a statement.

At page 32 the petitioner states its version of the respondent's answer to the action on the notes. The respondent respectfully refers the Court to its answer printed at page 3 of the record.

At page 42 the petitioner states: "It was admitted that it takes greater power to set metal than to bend it." The references are to the testimony of Prof. Townsend and Messrs. Kingsland and Ohl. The latter two witnesses were produced by the petitioner. Prof. Townsend was produced by the respondent. Surely the testimony of the witnesses introduced by the petitioner cannot be said to be *admissions* by the respondent. As to Prof. Townsend, what he really said, at page 107, was that the "whole load is used in setting and not bending the material," which simply means that there was a margin of load between the bending and forming requirements of the machine. But the professor also testified, at page 94 of the record, that in his opinion "the machine could not bend ⅜" material of 12 foot 6 inch lengths on dies the female member of which was 3 inches across."

Again, at page 48, the petitioner charges the professors with causing the machine to break. This is unwarranted by the reference, and the jury, by their verdicts, evidently refused to ascribe the break to any fault on the part of the professors.

At pages 48 and 49 the petitioner seems to attribute to the respondent and to Prof. Townsend a demand for a particular kind of safety device. The truth is, the professor's

opinion was that the machine contained *no* efficient safety device (R. p. 105).

At page 59 the petitioner speaks of bending ⅜" metal at petitioner's plant in the presence of one of the respondent's employees. But it neglects to state that the petitioner did not then have a piece of ⅜" steel and improvised a piece of plated metal as a substitute for the test without so informing the employee. Besides, there were three 4-foot pieces bent during that demonstration, but no one 12-foot length. These admissions by the petitioner may be found at pages 163, 164, of the record.

At page 79 the petitioner attributes to Mr. Smith of the respondent company an admission that the machine had a value of $2500. There is not a scintilla of testimony by Mr. Smith to support that statement.

Part One.

Argument of the Law.

I.

The Alleged Bills of Exceptions.

1. Even before the passage of any statute regulating the due authentication of a proposed bill of exceptions it was held by this Court that such a bill, to be entitled to consideration upon its merits, must be signed and sealed by the judge who tried the case.

Mussina v. *Cavazos,* 6 Wall. 355, 363.

2. Then came the Act of June 1, 1872, c. 255 (17 Stat. 197), which this Court held was passed—

> "To make it clear that a seal to a bill of exceptions was not necessary to its validity."

Origet v. *United States,* 125 U.S. 240, at page 244.

3. That view of the Act of June 1, 1872, was affirmed by this Court as late as 1928. This Court then held:

> "With the passage of that Act it is not necessary to seal a bill of exceptions . . . *but the signature is still necessary.*" (Italics ours.)

Krauss Bros. Co. v. *Mellon,* 276 U.S. 386.
See quotation in opinion of Circuit Court of Appeals, R. p. 267.

4. The first case which appears to have come to the notice of this Court under the original Act resulted in a ruling that the initials of the trial judge to a proposed bill of exceptions did not satisfy the statute.

Origet v. *United States,* 125 U.S. 240, 244.
See also *United States, ex rel. Kinney,* v. *United States Fidelity Co.,* 222 U.S. 283.
Malony v. *Adsit,* 175 U.S. 281.
Krauss Bros. Co. v. *Mellon,* 276 U.S. 386.

5. So that it would seem that the Circuit Court of Appeals could not escape the conclusion that the so-called bills of exceptions in the case at bar were "not sufficiently authenticated."

Opinion, R. p. 268; 57 F. (2d) 44.

6. And, as has been pointed out, the various circuits to which the precise question as to the necessity for the judge's authentication was presented, being bound by the law of this Court, ruled likewise.

Goetzinger v. *Woodley,* 17 F. (2d) 83 (C.C.A. 4th Circ.).
Knight v. *Illinois R. Co.,* 180 F. 368, 371 (C.C.A. 6th Circ.).

Oxford &c. R. Co. v. *Union Bank,* 153 F. 723 (C.C.A. 4th Circ.).

7. Irrespective of the judge's contribution to the lack of proper authentication, the respondent respectfully submits that "It is incumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice in preparing and presenting bills of exceptions."

Oxford &c. R. Co. v. *Union Bank,* 153 F. 723 (C.C.A. 4th Circ.).

In the case last cited a so-called bill of exceptions was rejected because, among other things, it was initialed by the trial judge, and the Court there said:

> ". . . nor can the judge after the time within which the bill of exceptions is required to be signed cure an omission or failure to sign the same by certifying that it was allowed, settled and signed within the time allowed by law."

This Court has held that—

> "It certainly cannot be contended that, if the trial judge is able officially to sign the bill of exceptions, it would be competent for counsel to dispense with his action. . . ."

> "The duty of the court of error is limited to determining the validity of exceptions *duly tendered and allowed.*" (Italics ours.)

Michigan Bank v. *Eldred,* 143 U.S. 293, 298, 299.
Malony v. *Adsit,* 175 U.S. 281.

Thus it will be seen that this Court regards it to be the duty of an appellant to see to it that the proposed bill of

exceptions is not only properly and seasonably prepared and presented, but duly allowed as well.

8. *Though petitioner's brief indicates great industry on the part of its learned counsel, the petitioner has failed to cite a single case which is in conflict with the decisions above cited.*

If learned counsel for the petitioner cites *Steen* v. *First National Bank*, 298 F. 36, to control the foregoing cases cited by the respondent, the distinction would seem to be simple. In that case there is no question as to the judge's *signature*. The full name and title of the judge were subscribed. They merely appeared in a space below the blank provided for them. The location of the signature being the only question raised, the Circuit Court of Appeals refused to dismiss the bill.

It may be noteworthy that the case of *Krauss Bros. Co.* v. *Mellon*, 276 U.S. 386, in which this Court held that the signature is still a requisite, was decided in 1928; whereas the case of *Steen* v. *First National Bank, ubi supra,* was decided in 1924.

The respondent therefore submits that the judge's signature is one of the conditions precedent to the consideration of a proposed bill of exceptions in the Federal Courts.

Compare *Thorndike, Petitioner*, 244 Mass. 429, 431.
Wilson v. *Checker Taxi Co.*, 263 Mass. 425.

II.

St. Feb. 26, 1919, C. 48, Now Part of U.S. Code, Tit. 28, Sec. 391.

1. At page 11 of the petitioner's latest brief it says:

> "The error of which we complain is that the Circuit Court did not apply this statute in our case."

2. Nothing is clearer from the decisions and the tenacity with which the Courts have adhered to the requirement of

a proper authentication by the trial judge than that its omission is not regarded as mere harmless error.

The due allowance of a bill of exceptions is a judicial, and not a ministerial, function, and cannot even be waived by the parties.

Malony v. *Adsit*, 175 U.S. 281, 287.
Oxford &c. R. Co. v. *Union Bank*, 153 F. 723, 727.

In the last-cited case the Court, in commenting on the Act of June 1, 1872, regulating the authentication of proposed bills of exceptions, said:

> "This *provision is mandatory, and must be strictly adhered to in every instance wherein a review is sought* by writ of error." (Italics ours.)

Again:

> *"While it is not the policy of the Court to dismiss writs of error in cases on appeal on account of slight technicalities, at the same time, the rules of this Court as well as the rules of the Circuit Court are plain and easily understood. In this case the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions."* (Italics ours.)

3. Our Circuit Court of Appeals obviously had this statute in mind when it quoted this excerpt from *Oxford &c. R. Co.* v. *Union Bank, ubi supra,* but, impliedly, adopted that Court's reasoning and arrived at the same conclusion.

4. The harmless-error rule was recognized by this Court long before its translation into statutory form in 1919 (St. Feb. 26, 1919, c. 48, now part of U.S. Code, tit. 28, sec. 391).

Vicksburg &c. R. v. *O'Brien*, 119 U.S. 99, 109.
Kalanianole v. *Smithies*, 226 U.S. 463.

Seaboard Railway v. *Moore,* 228 U.S. 433.
Grimes v. *Malcolm,* 164 U.S. 483, 492.

5. It introduces no new principle except that it throws the burden upon the defeated party to show by the entire record the denial of substantial justice.

Robilio v. *United States,* 291 F. 975, 980, 982 (C.C.A. 6th Circ.).
Shuman v. *United States,* 16 F. (2d) 457, 458 (C.C.A. 5th Circ.).

6. The respondent submits that the statute now under consideration is intended to encourage revisory Courts to support rather than review judgments if, on the whole record, such a result can be fairly reached. Or, to put it as one of the cases states the rule:

> "*. . . its purpose was to contract, not to enlarge, our powers of review; it was aimed at preventing reversals for minor errors, not to dispense with exceptions.*" (Italics ours.)

Brown v. *Carver,* 45 F. (2d) 673, 674 (C.C.A. 2d Circ.), and cases cited.

Several of the cases cited in the last-mentioned case are strikingly analogous to the case at bar.

Rumsey v. *N.Y. Life Ins. Co.,* 267 F. 554 (C.C.A. 9th Circ.).
Rosen v. *United States,* 271 F. 651 (C.C.A. 2d Circ.).
United States v. *Penn. R. Co.,* 283 F. 937, 939 (C.C.A. 4th Circ.).
Robilio v. *United States,* 291 F. 975, 980, 981 (C.C.A. 6th Circ.).

In the case of *Rumsey* v. *N.Y. Life Ins. Co.* the Court, speaking of the harmless-error rule, says:

> *"It has no reference to the preliminary steps by which a case is brought into an appellate court . . . nor does it enlarge the power of an appellate court to entertain appeals or writs of error."* (Italics ours.)

In the case of *Rosen* v. *United States* a stipulation was entered into between counsel, and the Court entered an order entitled: "Order settling case," which read: "On the above stipulation the following . . . containing all of the evidence given and proceedings had upon the trial of this action is hereby ordered settled and placed on file in Erie county clerk's office." This was signed by the district judge. The Circuit Court of Appeals in its opinion, at pages 652, 653, says:

> "It is hardly necessary to say that this is not a bill of exceptions . . . *The consent is worthless.* . . . It is only through a bill of exceptions duly authenticated as such that rulings of a judge made at the trial become a part of the record to be reviewed. . . .
>
> "We do not construe the section as authorizing appellate courts to decide on the whole record whether exceptions have been taken or not. *The mischief it was intended to correct is just the opposite of overlooking defects due to negligence, ignorance or inadvertence, viz. the reversal of judgments because of errors, defects, or exceptions which, though raised with technical accuracy, do not affect substantial rights."* (Italics ours.)

The same rule has been applied in other criminal cases.

> *Blakeslee* v. *United States,* 32 F. (2d) 15 (C.C.A. 1st Circ.), and cases cited.
>
> *Redmond* v. *United States,* 8 F. (2d) 24 (C.C.A. 1st Circ.).

In the last-mentioned case the Court, after discovery of an erroneous ruling on evidence, nevertheless held that on

the whole record the substantial rights of the defendant had not been prejudiced, and dismissed the appeal.

This Court, in referring to the Act under consideration, held likewise.

Horning v. *District of Columbia,* 254 U.S. 135.

The essential circumstances do not differ from those which were present in the many cases hereinbefore cited in which the respective bills were rejected.

The respondent therefore submits that by the preponderance of the cases St. Feb. 26, 1919, was intended to enure to the benefit of the appellee rather than the appellant.

III.

U.S. Code, Tit. 28, Sec. 777.

The petitioner contends that the Circuit Court was in error in not remitting the case for amendment of the authentication or refusing to treat it as being amended.

At page 16 of its brief it cites in support of that proposition, among other cases:

Idaho & Oregon Land Co. v. *Bradbury,* 132 U.S. 512, 513.

That case is clearly distinguishable from the instant case. That was a suit in equity which went up on appeal. No bill of exceptions was involved. So that the Act of June 1, 1872, did not apply.

At page 17 of its brief the petitioner cites *Michigan* v. *Eldred,* 143 U.S. 293. There the defendant prevailed in the trial Court; the plaintiff's exceptions were duly allowed. The excepting party came to this Court on a writ of error which included his bill of exceptions. While the writ was pending and after the trial term of the lower Court had expired, the plaintiff persuaded the trial Court to allow an

amendment to the bill of exceptions theretofore allowed as of the date of the original allowance. Thereupon, the plaintiff again addressed this Court with a petition for certiorari based on the amended bill of exceptions, the writ of error being still before this Court.

The Court expressly rejected the amended bill of exceptions, so called, and ordered a new trial for reasons relating exclusively to the original bill of exceptions.

At page 18 of its brief it cites *United States, ex rel. Kinney,* v. *U.S. Fidelity & Guaranty Co.,* 222 U.S. 283, 284, and quotes a portion of the opinion from which it implies that the Court had the power of amendment. But the respondent points out that just before the underlined portion of the quotation the Court says:

> "As to the contentions which relate to occurrences at the trial, they cannot be considered, as the record *contains no bill of exceptions.* The paper in the record styled 'Exceptions to the charge to jury,' initialed 'J.B.McP., trial judge,' and signed by the plaintiff, *is not a bill of exceptions* (Origet v. United States, 125 U.S. 240, 243), . . ." (Italics ours.)

The respondent submits that from this unqualified statement of the law it should be implied that the following sentence is but another reason why, in the judgment of the Court, the bill, even if proper in form, could not be sustained. It surely does not support the inference attributed to it by the petitioner.

On the other hand, on this very point it has been held that the judge is without power, after the time within which the bill of exceptions is required to be signed, to cure an omission or failure to sign it by certifying that it was allowed, settled, and signed within the time allowed by law.

> *Oxford &c. R. Co.* v. *Union Bank,* 153 F. 723, 726, *supra.*

This Court approved rulings of other Courts to the effect that a stipulation upon an agreed statement of facts and law substituted for the action of the Court in settling a bill of exceptions is a nullity. Nor may parties agree that a judge other than the trial judge perform his function in that regard. An unauthenticated bill cannot be validated by consent of the parties.

Malony v. *Adsit*, 175 U.S. 287.

The respondent has shown that several circuits have held that parties cannot by agreement improvise a bill of exceptions.

Rosen v. *United States*, 271 F. 651, 653, and cases cited.

The persistent refusal of the Courts to accept for review any form of presentation other than a formal bill of exceptions duly authenticated would seem to justify the inference that the Courts cannot, or certainly will not, permit amendments to supply the deficiencies, except in those rare instances which will be discussed under the next caption.

IV.

Amendment After the Term.

Counsel for the petitioner concedes, at pages 18, 19, of its brief, that exceptions must be signed before the Court loses jurisdiction by expiration of the term or such time thereafter as may have been duly prescribed.

The petitioner points out that the statute requiring the judge's signature does not include a judgment term limitation. That statute deals only with the requisites of authentication.

At page 20 of its brief the petitioner cites *Matheson's Admrs.* v. *Grant's Admr.*, 2 How. 263, 281, to the proposition

that it is common to amend records after a writ of error has been brought.

In *Michigan Bank* v. *Eldred,* 143 U.S. 293, it is distinctly held by this Court:

> "After the term has expired, without the Court's control over the case being reserved by standing rule or special order, and *especially after a writ of error* has been entered in this Court, all authority of the Court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end." (Italics ours.)
>
> "The duty of the Court of error is limited to determining the validity of the bill of exceptions *duly tendered* and *allowed.*" (Italics ours.)

The Courts have held that after the term the Court is without power to allow a bill of exceptions or any amendments thereto.

> *Exporters* v. *Butterworth-Judson Co.,* 258 U.S. 365, 369.
> *United States* v. *Mayer,* 235 U.S. 55, 67.
> *Delaware Rd. Co.* v. *Rellstab,* 270 U.S. 1.

Furthermore, the amendment cannot be accomplished by a *nunc pro tunc* order.

> *Michigan Bank* v. *Eldred,* 143 U.S. 293.
> *United States* v. *Seale,* 45 F. (2d) 394 (C.C.A. 5th Circ.), and cases cited.

As to the cases cited by petitioner at pages 20, 21 of its brief to illustrate instances of extraordinary circumstances under which amendments have been allowed, the respondent says that they do not support the proposition there stated.

In *Muller* v. *Ehlers,* 91 U.S. 249, the exceptions were rejected because they were not submitted or signed until after the term; and judgment was affirmed.

In *Jones* v. *Grover & Baker Sewing Machine Co.*, 131 U.S. Appx. *cl.*, the bill of exceptions was rejected and judgment was affirmed.

In *Michigan Bank* v. *Eldred*, 143 U.S. 293, a petition for a writ of certiorari, containing a modified bill of exceptions signed after the term, was rejected.

In *United States* v. *Breitling*, 20 How. 252, the bill of exceptions was authenticated after the term, but this Court says, in *Muller* v. *Ehlers*, 91 U.S. 249, at 251, with reference to the Breitling case:

> ". . . it was probably for the reason that, upon the facts stated, the consent for further time beyond the term for the settling of exceptions might fairly be presumed. *That case went to the extreme verge of the law upon this question of the practice and we are not inclined to extend its operation.*" (Italics ours.)

In *Dredge* v. *Forsyth*, 2 Black, 566, the bill of exceptions was filed and allowed within the term; the issue was simply whether the exceptions should be sealed and allowed before the jury retired.

In *Hume* v. *Bowie*, 148 U.S. 245, the term was extended before its expiration by order of the judge.

In *Davis* v. *Patrick*, 122 U.S. 138, the opposing party expressly consented within the term to extension beyond the term.

In *Waldron* v. *Waldron*, 156 U.S. 361, there was express consent within the term to extension beyond the term.

Chateaugay &c. Co., Petitioner, 128 U.S. 544, was a case in which mandamus was granted to compel the judge to settle and sign a bill of exceptions on the grounds that the parties had relied upon an express order during the term. There was compliance with the pertinent rule of the Court, and consent of the plaintiff to belated allowance was inferred.

In *Hunnicutt* v. *Peyton*, 102 U.S. 333, the exceptions were signed within the term.

If extraordinary circumstances exist in this case, the respondent is not aware of them unless the failure of the trial judge to comply with St. June 1, 1872, constitutes such a situation.

But presumably the same defect was, in part, attributable to the judge in each of the following cases:

Origet v. *United States*, 125 U.S. 240.
Malony v. *Adsit*, 175 U.S. 281.
Oxford &c. R. Co. v. *Union Bank*, 153 F. 723.
United States, ex rel. Kinney, v. *U.S. Fidelity & Guaranty Co.*, 222 U.S. 283.

And yet every one of these cases resulted in a dismissal of the review. There was no intimation in any of them that the circumstance of the failure of compliance with the statute constituted such extraordinary circumstances as to warrant a remission for amendment or a condonation of the defect, although the harmless-error rule was in existence either at common law or by statute throughout the period covered by these last-cited cases.

Thus far the petitioner has taken all of the following positions: A deputy clerk told petitioner's counsel that the bills had been allowed; the initials of the judge constituted sufficient authentication; if not, it was the judge's mistake; and the Circuit Court of Appeals should have overlooked it as harmless error or permitted an amendment. To cap the climax the petitioner argues, at page 23 of its brief, that respondent's assent to the proposed bills continues until "all that is necessary is done to give the bills their intended legal effect. . . ."

The true purpose and extent of the assents is more accurately described by the petitioner at page 20 of its petition for rehearing addressed to the Circuit Court of Appeals.

A mere reference to the opinion of the Circuit Court of Appeals, at page 267 of the present record, will show that the position then taken by the petitioner with reference to

the assent of the respondent to the substitute bill of exceptions was that, because it "was assented to by counsel for the A. L. Smith Iron Works [the respondent], therefore we [the Court] should treat it as a bill of exceptions even though not signed by the district judge." Clearly this quotation proves that, at the bar of the Circuit Court of Appeals, the petitioner did not attempt to stretch the assent of the respondent to include an agreement to extend the time for the presentation and allowance of the bill. In any event, the Circuit Court of Appeals did not so interpret the assent nor the immediate contention of the petitioner with respect thereto. On the contrary, the petitioner's position at that time, and the interpretation of the Circuit Court of Appeals of the petitioner's position, was that the assent was restricted to an approval of the form and contents of the bill.

If the petitioner is right in its present contention, it withheld its true purpose from the respondent. But respondent would not even attempt to persuade the Court that the petitioner did withhold such a mental reservation. The fact is apparent that neither counsel contemplated that the mere assent of the respondent to the form of the bills contemplated the contingencies that have since arisen.

This was not an extension of time within which to present and allow the bills, as in—

> *Waldron* v. *Waldron*, 156 U.S. 361, 378.
> *Taylor* v. *United States*, Adv. Opinions, 1931-1932, p. 662.

This Court, in dealing with a case where consent was urged as a ground for the allowance of a bill of exceptions after the expiration of the term, said:

> "So grave a matter as the allowance of a bill of exceptions after the close of the term and after the court had lost all judicial power over the record should not rest upon a mere implication from silence. *There should*

be express consent, or conduct which should equitably estop the opposite party from denying that he had consented. There was nothing of that kind in this case, and the judgment of the Court of Appeals must be affirmed." (Italics ours.)

Jennings v. *Phil., Balt. & Wash. Ry. Co.*, 218 U.S. 255, 257, 258.

In the case at bar there was no express consent to an extension of time for the presentation and allowance of the bill. No such consent was sought by the petitioner because, obviously, it did not require such an extension. There is no intimation that the respondent did anything to mislead the petitioner. The petitioner did nothing, and did not refrain from doing anything, in reliance upon the assent of the respondent other than to present the substitute bills well within the term with the assurance that there would be no contest as to their form. The respondent did not, nor had it any reason to, concern itself further until it received the transcript of record in the Circuit Court of Appeals, and thereupon, at its first opportunity, it openly and clearly asserted its objection and moved to strike the bills from the record. This statement in substance comprehends the conduct of the respondent with respect to the bills.

If this suggestion of the petitioner implies that even now the bills may be allowed, then it follows logically that the petitioner conceives the case to be still pending in the District Court with a bill of exceptions awaiting allowance. That would indeed be an anomalous situation. Surely the petitioner does not imply that the Circuit Court of Appeals has original jurisdiction to allow a bill of exceptions by means of amendment or otherwise. Its function is to deal with errors of law alleged in a bill duly allowed by the trial Court. That is clearly settled by this Court.

Michigan Bank v. *Eldred*, 143 U.S. 293.

V.

Appeal as Affecting Jurisdiction After Term.

An appeal at law does deprive the Court of jurisdiction to allow a bill of exceptions.

> *Jennings* v. *Phil., Balt. & Wash. Ry. Co.*, 218 U.S. 255, 256.

The petitioner cites *Barber Asphalt Co.* v. *Standard &c. Co.*, 275 U.S. 372, at page 24 of its brief, to establish the converse of this proposition. But an analysis of that case will easily show the distinction between it and the case at bar.

That case arose in equity under Rule 75 *b*, which had been promulgated seven years before the case was decided. This is an action at law and arises under a statute in force since 1872. It was held in the Barber Asphalt case that a cause in equity could, in the discretion of the Appellate Court, be remanded for correction of the record on appeal and that the Court exceeded its discretion in refusing to so remand. But this Court added that a distinction must be observed between reviews at law and in equity, and at page 385 cites in that connection:

> *In re General Rule 75*, 222 F. 884 (C.C.A. 6th Circ.).
> *Struett* v. *Hill*, 269 F. 249 (C.C.A. 9th Circ.).
> *Sussex &c. Co.* v. *Midwest &c. Co.*, 294 F. 597, 600 (C.C.A. 8th Circ.).
> *United States* v. *Mayer*, 235 U.S. 55, 67.

At page 21 of its brief the petitioner cites:

> *Taylor* v. *United States*, 52 Sup. Ct. Rep. 466.

There the Court distinctly held that the parties had agreed to an extension of the time to present a bill of exceptions to May 17th, which happened to be a Sunday. That on the 18th

"in pursuance of the earlier agreement the judge signed the bill." No such situation is disclosed in the instant case.

Much stress is laid by the petitioner upon a so-called certificate of a clerk of the United States District Court in which he says in substance that bills of exceptions in this district have been signed both by initials and full signatures and that the question of their validity has never been raised until this case arose. Having had no opportunity to know that such a statement would be elicited or engrafted upon the record, the respondent has not delved into the records of the Court to examine all the cases in this district within either category (Petn. for Cert. pp. 8, 9). But the respondent submits—

a. That ex-parte and gratuitous statements are not part of the bill and are not entitled to consideration.

b. The question may not have arisen before now in this jurisdiction; but obviously it has arisen repeatedly in other jurisdictions and been uniformly condemned. This Court reiterated the law as late as 1928.

Krauss Bros. Co. v. *Mellon,* 276 U.S. 386.

c. It is not the duty of the Circuit Court of Appeals to notice the defect of its own motion; appellees may waive it.

d. If the cases referred to by the clerk are cited as precedents for the proposition, this Court has held that it will not treat as precedents, nor differentiate, cases in which the precise issue was not raised.

Webster v. *Fall,* 266 U.S. 507, 511.

e. It is assumed that St. June 1, 1872, cannot be abrogated by custom.

The Circuit Court of Appeals deals with the question of amendment after the term as matter of law as well as discretion.

As to the ruling of the Circuit Court of Appeals that it was too late to remand the case to the trial Court for amend-

ment, the respondent submits the Court's opinion shows abundant authority for its conclusion.

As to the question whether the Circuit Court should have treated the bill as having been amended to conform to the requirements of the statute, the Circuit Court of Appeals considered that question from a discretionary viewpoint, as is indicated by its quotation from the opinion of Pritchard, J., at page 268 of the record, and obviously concluded that the circumstances did not entitle the petitioner to that relief. This conclusion is one of the subjects of criticism by the petitioner (see Petitioner's Brief, p. 3, par. 5, where the petitioner appears to epitomize the facts on which it seems to rely for discretionary favor).

Even if these assertions were properly a part of the record, the respondent submits that they fall far short of making out a case for the favorable exercise of the Court's discretion. On the record it cannot be said that the Circuit Court of Appeals abused its discretion.

VI.

The Contents of the Record.

The following documents have, in one way or another, been injected into or engrafted upon the papers before this Court in contravention of law, *i.e.:*

1. The so-called "Motion to amend substitute bill of exceptions" (Minute Entries, R. p. 6).

On August 8, 1930, the petitioner filed its "substituted bill of exceptions" bearing the respondent's assent.

The record discloses that on August 20, 1930, the substituted bill of exceptions, said motion to amend the substituted bill of exceptions, and the bill of exceptions concerning the plaintiff's motion for new trial were allowed (R. p. 6).

The respondent can account for the bill of exceptions

relating to the new trial motion. It is assented to and identified in the record (R. p. 226).

But as to the motion to amend the substituted bill of exceptions the respondent was, and still is, mystified. It has no separate place in the transcript of the record, and the only way respondent can account for that fact is as follows:

At page 6 of the petitioner's petition for rehearing addressed to the Circuit Court of Appeals, which we understand was before this Court in conjunction with the petition for the writ of certiorari, the petitioner says:

> "The appellant duly and seasonably presented 'assented to' bills of exception to the trial judge for allowance."

But at page 19 of the same document the petitioner says:

> "On August 8, 1930 appellant filed two substitute bills of exception, assented to, and a motion to amend, *not* assented to. On August 20th. appellant's counsel told the trial judge of the above and asked to have a date assigned for hearing on the motion." (Italics ours.)

And the petitioner goes on to say, in substance, that the judge indicated he would allow it in the absence of the respondent and without notice or hearing. Thereafter, on that day, it appears that the substitute bills, to which the respondent had assented, as well as the exceptions relative to motion to amend it and to the motions for new trial, were so allowed. There is nothing to show that respondent's counsel had any knowledge of these occurrences, and the plain inference is that they were not aware of them until the transcript of record was served on them.

It then developed, for the first time, that the motion to amend the substitute bill of exceptions, not bearing the respondent's assent, had somehow or by some one been merged into the substitute bill of exceptions which did bear the respondent's assent (see Transcript of Record before

the Circuit Court of Appeals, p. 7; Transcript of Record before this Court, R. p. 7).

The respondent submits that this situation discloses that the so-called substitute bill of exceptions before the Court is not in all respects accurate, and should *therefore* be rejected.

2. Stipulation as to exhibits.

On page 224 of the present record there appears a stipulation as to exhibits not incorporated in the bills of exceptions. While the stipulation is undoubtedly signed by respondent's counsel, they consider it their duty to call the attention of the Court to the fact that it is not certified by the clerk or authenticated by the trial judge.

The only reference in the so-called bill of exceptions to exhibits not incorporated therein is to be found on page 11 of the present transcript of record. Respondent submits that too much is left to conjecture as to what is referred to in that statement at page 11, aforesaid, notwithstanding the stipulation happens to be included in the transcript. Nor is the stipulation effective to waive certification.

The respondent respectfully submits that the stipulation is not properly part of the record, and should be rejected.

> *Krauss Bros. Co.* v. *Mellon,* 276 U.S. 386.
> R. p. 267 (Opinion of the Circuit Court of Appeals).

The petitioner relied in its brief, to some extent, upon some of the exhibits referred to in this stipulation, for example: Exhibits 14, 17 (Brief, p. 36); Exhibits OOO, RRR (Brief, p. 80).

3. "Request of trial judge," "certificates" of the clerk and deputy clerk of the United States District Court, and petitioner's brief to the Circuit Court of Appeals.

The petition for rehearing submitted by the petitioner to the Circuit Court of Appeals and the brief of the petitioner

on its petition for the writs of certiorari addressed to this Court are presumably among the papers now on file in this proceeding.

The petition for rehearing has been omitted from the present transcript of record, but respondent cannot foretell whether or not, or to what extent, it will be considered by the Court.

Attached to it are the "Request of Trial Judge," p. 42, "Certificate of Clerk," p. 38, "Certificate of Counsel," p. 36, "Affidavit of Louis B. King," p. 37, "Supplementary Facts, etc.," p. 19. There is also attached to the petition for the writs "Certificate of James S. Allen, Clerk," p. 8.

All these statements are obviously ex-parte and self-serving. While they do not appear to the respondent to be harmful to it, the respondent submits that on the authority of *Krauss Bros. Co.* v. *Mellon,* 276 U.S. 386, and Rule 38, par. 1, of this Court, they are not properly part of the record, and should be disregarded.

Merely by way of illustrating the danger of accepting such ex-parte statements and the value of the rule excluding them, respondent points out that, in the footnote referred to, the petitioner states: "Neither then nor later did they [respondent's counsel] file or present any formal motion to that issue."

Fortunately that statement is refuted by the Circuit Court of Appeals in its opinion, R. p. 266, where it states: ". . . and for this reason they [respondent's counsel] move that the bill of exceptions be stricken from the record."

The footnote at page 2 of the petitioner's brief incorporates, by reference, the petitioner's supplemental brief to the Circuit Court of Appeals and other matters, all of which, under the rule of this Court above referred to, the respondent submits, are not properly part of the record before this Court, and should not be considered.

Harding v. *Illinois,* 196 U.S. 78, 84.

Conclusion on This Branch of the Case.

The respondent submits in conclusion as to the issues arising out of the alleged bills of exceptions:

1. The petitioner has failed to establish its burden of showing error of law or excess of discretion on the part of the Circuit Court of Appeals.

2. That this Court has not ignored St. June 1, 1872, nor regarded it as obsolete. And the Circuits which have had occasion to deal with it have consistently and uniformly followed the law given them by this Court.

3. No rule has been more rigidly enforced than that which deprives the Federal Courts of law of all jurisdiction of bills of exceptions after the expiration of the term unless it has been definitely extended by order or agreement within the term or unless "extraordinary circumstances" have intervened.

4. St. Feb. 26, 1919, the so-called harmless error statute, was enacted, not to encourage appeals, but to prevent reversals; not to protract, but to terminate, litigation.

These being the principal issues raised by the petitioner in this branch of the case, we proceed to apply them to the errors alleged in the plaintiff's brief, at page 3 thereof:

1. There is not the slightest divergence of views among the Circuits on any of these fundamental principles. In any event, this Court has spoken on each of them in unmistakable language.

2. The pertinent statutes and the adjudications thereunder constitute mandates to the bar, and through them to the public.

3 Observance of these mandates would conduce to uniformity and precision of procedure. Indifference and disdain of them are bound to lead to undue confusion, delay, and waste.

4. To permit a litigant to ignore salutary rules of procedure—nay, statutes of procedure—with impunity is to

put a premium on laxity and discourage those who do endeavor to conform to them.

Notwithstanding the severe and unpardonable attack made by the petitioner upon the learned Circuit Court of Appeals at page 25 of the petitioner's brief, the respondent submits, as a fitting climax to this portion of its brief, the following extract from the work of Mr. Justice Story on Equity Pleading (sec. 544), where he comments upon the necessity of adhering strictly to the prescribed forms of procedure:

> "The want of due form constitutes a just objection to the proceedings in every court of justice, for to reject all form would be destructive of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice. Every irregularity of this sort is fraught with inconvenience, and generally tends to delays and doubts. And it has been well remarked that infinite mischief has been produced by the facility of courts of justice in overlooking errors of form. It encourages carelessness and places ignorance too much on a footing with knowledge amongst those who practice the drawing of pleadings."

It is therefore respectfully submitted that the Circuit Court of Appeals was right in affirming the judgments of the District Court.

Part Two.

Assignments of Error.

The respondent desires to make it clear to the Court that it does not waive or lack confidence in the contentions made in Part One of this brief, but submits its comments on the assignments of error claimed by the petitioner with a view to demonstrating to this Court that they are not tenable and that, on the whole record, no harm was done the petitioner by the rejection of the so-called bills of exceptions.

General Rule Relating to Rulings on Questions of Evidence and Refusals of the Court to Charge the Jury in Accordance with Specific Requests on Isolated Portions of the Evidence.

Irrespective of the arrangement of assignment of errors in the transcript of record a careful examination of them will disclose that they actually comprise about 120 separate and distinct alleged errors. It now appears from pages 27 and 28 of the petitioner's brief that it has decided to waive a few of the alleged errors.

A large proportion of the alleged errors relate exclusively to rulings on questions of evidence. In no instance does it appear that the petitioner supported its objection to such rulings by a statement of the grounds therefor.

The respondent respectfully submits that it is a well-settled rule of the Federal Courts that exceptions predicated upon such rulings under such circumstances are not reviewable *as matter of right.*

Blakeslee v. *United States,* 32 F. (2d) 15, 17 (C.C.A. 1st Circ.).

The petitioner, prior to the judge's charge, filed 76 written requests for rulings to be given to the jury. These rulings bore on isolated portions of the alleged testimony and were all refused by the trial Court, with one exception. The petitioner in its assignments of error has alleged error in the denial of each and every one of these requests. It is a well-established rule of practice that it is largely a matter of discretion with the presiding judge as to how far he will discuss the different phases of the testimony upon a particular subject and give specific instructions, each founded upon only a part of the testimony appearing upon the subject.

Pennsylvania Co. v. *Olivit Bros.,* 243 U.S. 574, 583.

Herrick v. *Waitt,* 224 Mass. 416.

Buckley v. *Frankel,* 262 Mass. 13.

Hicks v. *N.Y., N.H. & H. R.R. Co.*, 164 Mass. 424, 428.

These comments are made at this point because of their uniform applicability to the respective classes of rulings referred to and also to avoid redundancy.

Discussion of the Assignments of Error.

The respondent will deal with the alleged errors now urged by the petitioner in their numerical order, shown in petitioner's brief, pp. 27, 28.

1. The petitioner stressed the so-called acceptance of the machine. But, in addition to the fact that the memorandum of acceptance was nothing more than an expression of opinion by Hovasse that "it was satisfactory," and was not the result of a test under conditions prescribed by the memorandum of sale and warranty later entered into, it was not conclusive as to performance; the circumstances under which it was given could be introduced to explain it (R. p. 60).

Incidentally, the objection noted by the petitioner relates to "all the conversations prior to the date of the written contract declared on." Such a sweeping and anticipatory objection would seem to be improper, although the respondent has dealt with it as though it were properly presented and saved.

As to the second objection within this assignment of error, the respondent submits that the answer of the witness Smith was, in the main, responsive to the question asked him on cross-examination by counsel for the petitioner. Such portions of the answer as may not have been strictly responsive were harmless repetitions of things which the witness had already testified to. Moreover, the request was to strike out the whole answer, and not any portions of it.

Answering some of the suggestions of the petitioner at pages 35-37 of its brief, it will appear on reference to the

present record, p. 253, that the petitioner regards the contract between the parties as being contained in several letters, a set of specifications, and an agreement with a rider thereto attached. Since this motley group of documents, bearing different dates, relating to different subjects, and containing no correlating references to each other (except as to the specifications which are referred to in one of said documents), constituted the petitioner's idea of the contract between the parties, the respondent submits that oral evidence is necessarily admissible if for no other purpose than to connect them. Incidentally, there were several letters other than those mentioned by the respondent which passed between the parties in the course of the correspondence referred to in said assignment, all of which would seem to come within the same category.

Nickerson v. *Weld,* 204 Mass. 346, 356.
Bird & Son v. *Guarantee Construction Co.,* 295 F. 451, 456 (C.C.A. 1st Circ.).
Davenport Ladder Co. v. *Edward Hines Lumber Co.,* 43 F. (2d) 63, 66 (C.C.A. 8th Circ.).

The petitioner makes the point that the declaration in the respondent's action relied upon a written contract. The respondent submits that the declaration was sufficient to support the claim of an implied warranty; but, in so far as the petitioner now bases assignment 1, which deals exclusively with admission of evidence, upon pleadings, such objection was never specified until after the verdict, *i.e.,* in the form of the assignment now under discussion. Such an objection is not tenable.

Amer. Sugar Refin. Co. v. *Nassif,* 45 F. (2d) 321, 323 (C.C.A. 1st Circ.).

The petitioner claims certain special damage (R. pp. 230, 232). The evidence objected to was, in part, admissible on this issue.

Hanson v. *Wittenberg,* 205 Mass. 319.

2. On cross-examination by petitioner's counsel Mr. Smith had testified as follows: He was able to read blueprints and the specifications (R. p. 50); that the "specification is satisfactory to me if it will do what it says it will" (R. p. 54); that "I had been studying the blue prints received with the November 9th letter for several months and I wanted the machine built as shown in those blue prints"; that he saw nothing incorrect in the confirmation, Exhibit D (R. p. 52).

The respondent's contention throughout was that it had bought the machine for certain purposes clearly disclosed to the petitioner, and that the petitioner had impliedly warranted that the machine would accomplish those purposes. The cross-examination obviously attempted to discredit the witness Smith by showing he could not understand the blueprints and specifications relating to the machine, and could therefore not have intended to contract with reference to its suitability for the purposes to which he had testified. In view of this state of the evidence it was discretionary with the Court to permit the witness to state his understanding of the specifications with particular reference to the class of work he planned to do (R. p. 56).

At pages 40-41 of the petitioner's brief the petitioner asserts that the "contract contained no ambiguous words or phrases or any that Smith claimed as having any particular or trade meaning."

There was no issue of fact in the case that was more strenuously contested and consumed more time, as the record will indicate, than the respective contentions as to the meaning and scope of the word "bend."

There was no contest as to the business in which the respondent was engaged. It required of the machine in question the formation of commercial products. At page 15 of the record Mr. Smith of the respondent company made it clear at the outset that the steel is "placed on the machine and bent to form stair stringers to the side of a stair upon which the tread and risers are riveted. . . ." The stringers

are usually bent to a 90° angle, or square. On the other hand, the petitioner took the position that the press would not form the metal, but merely bend it (R. pp. 48, 183). Thus the issue of fact was framed. So that the petitioner contended that all that the machine was required to do was to bend the metal, irrespective of the extent of the bend or the shape of the product after it was bent. To illustrate the confusion, even in the mind of the principal spokesman of the petitioner company, his own superintendent in the course of his testimony definitely stated that forming the metal to a 90° angle or to the desired shape was the ultimate object of the bending process (R. p. 141).

The judge was unable to see why the respondent would want to bend steel without setting (forming) it (R. p. 219). The question as to what that term meant was properly left to the jury. It was ambiguous.

The term "bend" does not appear in the agreement of March 9th (R. p. 11), nor in the rider attached thereto. It first appears in the specifications. There it is qualified by descriptive language such as "this machine has been built to meet the demand for a machine which will bend the heavier gauges of metal *with ease* and you can *also bring out in fine detail, multiple bends* which cannot be accomplished in the lighter machines of this class" (R. p. 48). (Italics ours.) The dies are all 90° sharp-cornered. At page 20 of the record a letter of the petitioner to the respondent contains the following: "The corners will be as sharp as the material will allow." In the same letter petitioner says: ". . . we enclose drawings #5190 to 5193, inclusive, showing dies for *forming* tread and riser ends. . . ." (Italics ours.)

Then there is the letter from respondent to petitioner, Exhibit L (R. p. 21), calling for five sets of dies "for our riser . . ." "Also please manufacture a set of dies *to bend material at ninety degrees the full length of the machine.*" (Italics ours.)

That order is acknowledged in terms in Exhibit O (R. p. 21).

Again on page 22 of the record the phrase "The square on 90 degree die . . ." appears as having been "furnished by Ohl."

The blueprints all show sharp-cornered dies (Exhibit P, one of the exhibits referred to in the stipulation, at page 224 of the record).

Mr. Smith testified that he told Mr. Ohl that he wanted a machine which would form treads and risers (R. pp. 15 and 16).

Ohl agreed that Smith told him he wanted a press to make stair risers and stringers (R. p. 145), and that he, Ohl, realized that Smith did not know how to make dies, but that Ohl had made them, planned them, experimented with them, put them in the press *and formed* metal, had stopped at plants and told them how to put in the metal, etc. (R. p. 146).

Nowhere in Ohl's testimony is there any substantial difference between him and Smith relative to their preliminary communications on this subject.

Hovasse testified on cross-examination that when he was at the Ohl plant getting instructions as to how to manipulate the machine Ohl's foreman told him to use a piece of scrap and adjust the dies gradually *"until it squeezes into the right shape"* (R. p. 70). (Italics ours.)

The foregoing are but a few of the indications from the evidence that to accept the word "bend" as used in the specifications in the narrow and restricted sense asked for by the petitioner would be to distort the true intent and purpose of the parties and to permit the petitioner to escape liability by a mere play on words.

It was for the Court to determine, in the first instance, whether the word "bend" as used in the specifications, above referred to, was plain and unambiguous, or whether it was doubtful and required explanation in the light of the subject-

matter to which the transaction related and the circumstances under which it was entered into. The judge properly ruled that it was a phrase that required explanation, and was therefore warranted in admitting the evidence complained of in assignment 2.

West End Co. v. *Warren Co.*, 198 Mass. 320, 325.
Linton v. *Noonan,* 238 Mass. 31, 38.

In other words, there were several reasons, at least, for the admission of that evidence.

3. The witness Hovasse was a machinist, and so regarded by both sides. During its cross-examination of this witness the petitioner attempted to make it appear that the phrase "fly wheel bearings" used by him in respondent's notice of complaint, Exhibit CC (R. p. 30), was erroneous and misleading (R. p. 75); immediately after the introduction of Exhibit CC the reply thereto from the petitioner, Exhibit DD (R. p. 31), was introduced, and that clearly showed that the petitioner understood the reference to mean "fly wheel shaft" instead of "fly wheel bearing." But at page 82 of the record counsel for the respondent called the attention of the witness Hovasse, who had written the letter, Exhibit CC, to the reply, Exhibit DD, wherein the petitioner said: "an ordinary machinist should be able to take down the fly wheel shaft"; and then asked whether that shaft was the one on which the fly-wheel bearings and connections are mounted; to which he replied, "Yes, sir"; and further, he said, without objection, that he had told counsel for the petitioner that when he, the witness, read Exhibit DD, he learned that Mr. Ohl had understood his complaint.

At this point the question objected to was put. It was in part to prove the *bona fides* of the witness in using the term and also by way of summarizing what had just preceded it. It is respectfully submitted that the Court did not err in admitting this evidence, and further that it was no more

harmful to the petitioner than the questions and answers immediately preceding it, which went in without objection.

4. The witness last referred to had done all he could to satisfy counsel and the Court that his error in the use of the term "bearings" was an inadvertence, and had shown that the petitioner understood the true point in the machine referred to. Nowhere in the testimony of witnesses offered by the petitioner does it appear that the appellant was misled by or misunderstood the reference. The parties and the Court proceeded upon the assumption that the error had been satisfactorily explained. The objection was merely to the refusal of the Court to allow the spot referred to in the letter, Exhibit CC, to be identified on a paper not yet in evidence. It is submitted that the Court had the discretionary power on cross-examination to refuse to permit such an identification, and particularly an identification which would confuse rather than aid the jury. Exhibit TT, referred to in this assignment, is among those not included within the alleged bills of exceptions, though it is included in the stipulation relating to certain exhibits (R. p. 224). The assignment of error shows that Exhibit TT, on which the identification was sought, had not yet been put in evidence, and that the objection was not to the exclusion of Exhibit TT, but to the refusal of the Court to permit the identification of something upon it.

For some reason which the respondent is unable to divine, the petitioner takes occasion in discussing assignment 4 at page 57 of its brief to involve references to the notices of defects given by the respondent to the petitioner. The particular question which forms the basis of assignment 4 cannot possibly have any reference to the question of notice. It is evidently an afterthought. No question was made by anybody at the trial that the first notice given by the respondent to the petitioner was dated June 25th and that operations on the machine began April 15th, each of 1926. Nor was there the slightest doubt as to what this notice contained or that

the site of the trouble was incorrectly described. The notices will be discussed under the assignments dealing with that subject-matter.

7. As an operator on this very machine the witness was properly permitted to testify to the improbability of the machine being able to bend 3/8" stock to a 90° angle, having already testified that it actually failed to bend thinner stock to the same angle without bowing (R. p. 86). Bending 3/8" stock was the extreme capacity mentioned in the written warranty.

As in all other instances of the petitioner's objections, no indication was given by it as to the ground for this objection. It now argues at page 82 of its brief that the difficulty with the question was that it contained no reference to the size of the die. The fact is that the testimony objected to in this assignment was elicited on redirect, after a lengthy cross-examination concerning dies. After the redirect had been finished, the petitioner again took the witness and cleared up any possible doubt as to the distinction between the effect of the bend on a 2¼" die and the 3" die, which is all that this objection relates to (R. p. 91).

8. The witness, the operator on the machine in question, was apparently believed by the Court to have sufficient knowledge of the workings of the machine and their results to entitle him to give the obvious opinion asked for. That was discretionary with the Court, and it is submitted that the Court's discretion was not exceeded. Mr. Ohl, of the petitioner company, practically agreed with this witness (R. p. 184).

In this instance the question incorporates all the elements, *i.e.*, the thickness of the stock, the angle, and identity of the die.

10. In the specifications furnished by the petitioner to the respondent (R. p. 48) the petitioner represents that "this power adjusting motion is protected by our patented fric-

tion frog gear marked 'B' on enclosed blueprint, which is adjusted (so) that it will just lift the weight of the slide or hammer, and if the operator adjusts the slide down hard on the dies or up to the extreme limit, this gear will slip and no damage will be caused." Mr. Ohl testified the friction clutch is a safety device (R. p. 148).

The Court will kindly note that there is no question upon which the answer objected to in this assignment was predicated (R. p. 97). Furthermore, this evidence was elicited from the same witness by a question put by the Court without objection (R. p. 97).

In addition the respondent points out that these cross-actions were tried together and one of the issues raised by the respondent in its answer to the petitioner's action on the notes was lack and failure of consideration. This issue, in and of itself, warranted the evidence in question.

Furthermore, the question is not as to what kind of a safety device this machine had, as argued by the petitioner at page 48, but rather whether it had any.

11. The qualifications of the witness Perkins were clearly established (R. p. 110).

The question bore on the issue as to whether the machine was "of the best workmanship," and was fit to form steel of thicknesses up to three eighths of an inch and of angles of 90°, for use as stairs and stringers, without a safety device, in the light of the fact, then before the jury, that the machine, though properly adjusted, broke while being subjected to a less stringent test.

The respondent reiterates its references to the issues in the note action referred to under No. 9, and also refers to the argument under No. 7.

12. The various computations and consultations and the qualifications of the witness are set forth in his testimony (R. p. 110). Examination of the whole testimony of the witness shows that the evidence was competent, relevant,

and material. Whether the machine had a proper factor of safety was clearly competent and material on the issue of the cause of the break, and as to whether the machine was of the "best workmanship and material," which is part of the express warranty. Ohl contended that the break was due to overloading, and the question of the factor of safety in the machine became important in view of this contention, as well as on the issue of the fitness of the machine and the character of the "workmanship and material."

18. The question here objected to was put to a witness who represented the firm which had built the housings in question for the petitioner. The purpose of the question was to see whether his foundry had guaranteed the tensile strength and endurance of the housings to the petitioner.

This question was clearly admissible on cross-examination of the witness. The witness had testified as to the tensile strength of the housings on direct examination, and this question was admissible on the question of the credibility of the witness and the nature and purpose of the tests which the witness testified to on direct examination (R. p. 131).

19. The witness did not qualify as an expert on machines of this character; his field was restricted to castings. It was within the Court's discretion to reject the question. In any event, the opinion called for would necessarily have been based upon the opinion of another witness, and not upon a fact, as such.

In its present brief, p. 81, the petitioner contends that the purpose of this offered evidence was to meet evidence which the petitioner anticipated would be offered by the respondent. At the trial no such purpose was disclosed by the petitioner (R. p. 250).

21. The question is obviously incompetent because it would permit the witness to state his mental attitude toward the letter; and whether or not the letter or its purport meant anything was, in the last analysis, for the jury.

The respondent has heretofore demonstrated that the petitioner knew exactly what portion of the machine was meant to be referred to in the letter, Exhibit CC (Petitioner's Brief, p. 58).

23. This exhibit related only to tensile strength. In view of the testimony relative to tensile strength introduced by the petitioner through its witness Davis (R. pp. 131-132), the testimony of Ohl (R. p. 206), and the testimony of Mann (R. p. 208), this exhibit was relevant and material.

Like other tests which were attempted, it bore on the question of whether or not the material was of the "best" as required by the warranty.

24. This evidence was admissible within the discretion of the judge. The question of the tensile strength of the machine was gone into by counsel for Ohl, prior to the production of this witness (see testimony of Davis, R. pp. 131-132). The evidence in question was clearly relevant, and its significance was a fit matter to be considered by the jury.

The petitioner's brief, at page 81, complains that the specimens taken were taken from the machine without offer of proof as to when they were taken from the machine—before or after this crystallization—or as to the place in the stanchion from which they were taken. Both the place from which they were taken and the time when they were taken were definitely shown in the testimony of Hovasse (R. p. 210).

25. This evidence was properly admitted by the Court. The subject-matter had been gone into in the examination of witnesses who had testified prior to Mr. Mann. On cross-examination counsel for Ohl brought out the fact that, if a test bar is taken from a section that has been overloaded, such a test bar might show a slight difference in strength from that which the machine had before the overload, so that the contention of the Ohl Company was presented to the jury (R. p. 209).

26 and 27. The petitioner was not entitled, as of right, to an order requiring the respondent to elect as between its defense to the action on the notes and its cross-action.

Water &c. Co. v. *City of Hutchison*, 160 F. 41 (C.C.A. 8th Circ.).
Cinamon v. *St. Louis Rubber Co.*, 229 Mass. 33.
Snow v. *Alley*, 156 Mass. 193.
R.C.N. Mfg. Co. v. *Whittaker*, 49 R.I. 499; 144 Atl. 158.

The *remedies* between which the petitioner contends the respondent should have elected necessarily consist of the respondent's *answer* to the action on the notes and its cross-action.

In the first place, the petitioner assumes that these motions were too broad, in that the answer included a general denial as well as want and failure of consideration. So that the respondent will argue these assignments as though the motions related specifically to the special answers relating to consideration.

Under such answers it was open to the respondent to defend without rescinding.

Harrington v. *Stratton*, 22 Pick. 510.

The agreement between the parties (R. p. 11) is, at best, a conditional sale; either absence or failure of consideration is recognized by the Negotiable Instruments Law of Massachusetts as a defense *pro tanto* against a person not a holder in due course, "whether the failure is a liquidated or unascertained amount or otherwise." (Italics ours.)

Gen. Laws, c. 107, sec. 51.

Mere non-fulfilment by the petitioner of its agreements and warranties in consideration of which and by the very

terms of which the notes were given (R. p. 11 *et seq.*) was a complete defense under the respondent's answer.

Hawks v. *Truesdell,* 12 Allen, 564.

Neither absence nor failure of consideration is tantamount to recoupment. The two classes of defenses are clearly distinguishable.

Jackman v. *Doland,* 116 Mass. 550.

It has been recently held in Rhode Island that, where an article proved to be inferior to the warranty accompanying the sale, the breach could be set up in terms by way of defense, and the purchaser, having prevailed in the action against him, could not only proceed with his independent action for damages, but the judgment in the previous case could be introduced as *res adjudicata* on the matter of the breach, leaving nothing but damages for determination in the second action.

R.C.N. Mfg. Co. v. *Whittaker,* 49 R.I. 449; 144 Atl. 158.

In Massachusetts, where cross-actions arising out of the same contract of sale are tried together, one for recovery of the purchase price and the other for breaches of the agreement of sale, it has been held that the damage sustained by the purchaser, "must be assessed and applied first to cancel, *in whole or in part,* the sum due upon the contract for the goods delivered; if it exceeded that balance the excess would be returned in a verdict for the plaintiff in a cross action." (Italics ours.)

Star Glass Co. v. *Morey,* 108 Mass. 570, 573.
See also *Linen Thread Co.* v. *Shaw,* 9 F. (2d) 17 (C.C.A. 1st Circ.).

So that, applying this law to the facts in these cases, we find that, when the action on the notes was brought, the re-

spondent had paid out over $5000, including $2250 in spot payments and the remainder in the redemption of notes and interest; and had also paid out over $2600 to brace the machine, which had in the meantime cracked. Thus it was out of pocket over $7500 in cash and had a broken machine on its hands; prior to the break it had turned out some work with the machine which did not require a test of its guaranteed capacity, but the product had to be reworked by hand to recover it from bowing and other irregularities (R. p. 95).

Thus in less than six months after the arrival of the machine, without any fault on its part, it had a machine broken in a vital place, and therefore valueless (R. pp. 94, 95). If the respondent had dismantled the machine and returned it and had to restore its premises, its losses would have been even greater; it was too ponderous to move. It had been affixed to a rigid foundation built into the petitioner's premises. Its dimensions and weight appear in the respondent's Statement of Facts, Part One.

This was the situation when the action on the notes was brought. The respondent was confronted with the problem as to whether it should have to pay for a useless machine and rely for its reimbursement and damages on an independent action. This, the respondent submits, not only seemed an idle ceremony, but also tended to deprive the respondent of its just defense to the notes.

The law, as has been noted, recognizes that defense. If the petitioner's action had been on the agreement, a general denial would have sufficed. The action was based on notes; hence the respondent pleaded want and failure of consideration.

But the respondent conceived its damages to be greater than the balance due on the notes. It did not seek double damages; it sought only to be made whole. Thus it brought its own action.

It sustained the following damages: The amount it had already overpaid, which it claimed was the entire $5000;

the amount it had paid out to sustain the machine, $2631; and the sum of $3000 which Mr. Ohl of the petitioner company himself said was the difference between what the machine sold for and its real value when delivered (Exhibit FF, R. p. 33). These elements omit any consideration of the losses sustained by the respondent by reason of the inability of the machine to comply either with the express warranty to bend soft steel of a maximum thickness of three eighths of an inch on 3″ dies, or its unfitness to turn out merchantable products.

The situation that the Smith Company was in at the time of the action on the notes is recognized by the Sales Act. Section 59 of chapter 106 of the General Laws, the section immediately following that dealing with the rights of the buyer in the event of a breach of warranty, reads:

> "Interest and Special Damages.—Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

It appeared from the evidence that the Smith Company had paid in approximately $5000 and had expended $2500 in attempting to repair the press, thus constituting special damages, and that the Smith Company had a worthless machine. Clearly enough, the Smith Company should not pay any more on the notes for a worthless machine and should get back the money paid therefor, and for its repair, $7500. The way the Court charged the jury in this regard was not at all unfavorable to Ohl. The Court might well have told the jury to make the Smith Company an allowance for the special damage it incurred in its business, and for the fact that the machine was represented to be worth more than the contract price and that the Smith Company had lost the benefit of its bargain (Exhibit FF, pp. 33-34).

In respect to the plaintiff's damages, the petitioner's argument in its brief involves two fallacies as we see it. The first is that the Smith Company was keeping the dies and motor. In this respect the attention of the Court is called to the fact that the dies and motor were made for this specific machine and that the purchase was an entire one (R. pp. 11-12).

Barlow Co. v. *Stone,* 200 Mass. 158, 160, and cases cited.

It is clear that dies fitted for use only in a broken machine that could not perform the work it was supposed to do were worthless apart from the machine.

The second is the misstatement contained on page 79 of the petitioner's brief: "Yet Smith's own evidence admitted a $2500 value for the press." Smith did not testify as to the value of the press. The only evidence as to the value of the press came from a Mr. Perkins, a witness for the plaintiff, by whose testimony the plaintiff is not bound, and who testified that in March, 1926, *before the machine broke,* the machine had an estimated market value of $2500.

In the light of the evidence, and in the estimation of the Court, the verdicts rendered were logical and consistent.

28 and 29. These assignments are based on the judge's refusal to direct verdicts for the petitioner in both cases, and, to avoid repetition, they are here dealt with jointly.

It is respectfully submitted that the proper solution of the issues between the petitioner and the respondent required submission to the jury of all the evidence to determine the controverted questions as to whether (*a*) the machine in question was fit to perform the work for which it was bought, (*b*) whether it was of the best workmanship, (*c*) whether it was of the best material, (*d*) whether it had a capacity of bending soft steel of a thickness of three eighths of an inch, as per guaranty, (*e*) whether it in fact conformed to the

petitioner's specifications contained in the written agreement between the parties, (*f*) what the reasons for the defects and inferiorities were, (*g*) what caused one of the stanchions to crack, (*h*) what was the value of the machine before and after the break, (*i*) what were the damages which the respondent sustained; these are but a few of the vital issues which, it seems to counsel, required submission to the jury in both cases. In the statement of the cases which appears earlier in this brief, the evidence upon which the issues turn is condensed. It will be obvious to the Court from the record that practically every fact and opinion offered by either side was strenuously contested by the other side, and a vast amount of evidence, spoken, documentary, and specimens of the product of the machine, was put in by both sides.

Petitioner's brief, at page 27, refers to a discussion of these two assignments at page 52 of its brief. It appears that the petitioner's argument in support of these assignments is there confined to alleged errors relating to the complaints by the respondent concerning the machine, and not upon all the evidence. In its great zeal the petitioner has made these complaints the subject of specific assignments, and, pursuant to the plan of argument of the assignments originally outlined by the respondent, it will continue to argue them in their order.

30. The petitioner was not entitled to the requests referred to in this assignment.

(2) The Court is not required to rule upon the effect of portions of the evidence.

The request numbered (2) does not conform to the facts. The complaints concern the product of and service rendered by the machine, as well as the machine itself (Respondent's Specifications, R. pp. 8-10).

In the Court's charge the complaints were dealt with as follows: "The Smith Company keeps the machine. The Smith Company has not said the dies were improper; they

have said that the machine is no good and will not do the work that they [petitioner] promised it would do, and they say it was not worth the $5,000. that they spent on it."

(3) This request contains a statement which is equivalent to directed verdicts in both cases, to wit, ". . . The machine which Ohl delivered *in performance* of the contract between them. . . ." This request assumes that the machine was "delivered in performance of the contract." This was one of the very issues in the case. (Italics ours.)

The alleged acceptance was a mere memorandum given by one Hovasse, a mechanic employed by the respondent, who visited the petitioner's plant at Newark before delivery of the machine and before the memorandum of agreement was executed, to receive instructions in the operation of the machine. The purpose for which he was there, the extent of his authority, the circumstances under which he was induced to sign the alleged acceptance, and the so-called acceptance itself are set forth at R. pp. 58-61. It is obvious from the testimony at that point that he had no authority to bind the respondent, that he was imposed upon by representatives of the petitioner, and that the alleged test fell far short of the requirements of the express warranty.

At best the paper referred to was Hovasse's opinion; even if it went beyond that, the respondent is not precluded from recovery on the warranties. Accepting the petitioner's contention that the law of Massachusetts governs the parties, it is provided by the General Laws of Massachusetts that the right of the buyer to recover for breach of warranty survives acceptance if notice of complaint is seasonably given.

Mass. Gen. Laws, c. 106, sec. 49.
West End Co. v. *Warren Co.,* 198 Mass. 320.

Whether or not that right has been waived by any act of the buyer is a question for the jury upon all the evidence.

Borden v. *Fine,* 212 Mass. 425.

Herbrand v. *Lackawanna Steel Co.*, 280 F. 11 (C.C.A. 6th Circ.).

(4) Again, this request calls for a comment on the facts. The issues are clear. The Court said in the portion of its charge above quoted: "They [respondent] say it [the machine] was not worth the $5,000. that they spent for it." Later the Court says (R. p. 220) in effect that, if the machine would perform the work of bending these soft steel plates, "then your verdict must be for the Ohl Company for the full amount of what they are suing for." This seems to cover all that the petitioner would be entitled to on this phase of the issues. The respondent respectfully suggests that it, and not the petitioner, was harmed by this portion of the charge.

(5) The Court was not required to adopt this language. The language above quoted from the charge, it is submitted, was more favorable to the petitioner than was justified. The request is a virtual ruling of law which was clearly not warranted on the evidence.

(6) Again, the Court need not adopt the precise language of the request, even if the request called for an instruction of good law. But here, as in the previous requests, the petitioner asked the Court in effect to isolate that portion of the evidence relating to the question of consideration and rule upon it. This the Court was not required to do. To adopt the literal language of this request would leave the jury without proper understanding of its legal terms.

(7) Furthermore, the mere fact that the machine broke and thus became useless was sufficient to support the defense of failure of consideration. It required no warranty to support that defense. This is in reply to the petitioner's argument at page 73 of its brief.

The difficulty with the petitioner's argument is that it proceeds upon the hypothesis that the defense of failure of consideration is the equivalent of recoupment, and that fail-

ure of consideration must therefore be predicated upon breach of warranty. But according to the law of Massachusetts neither absence nor failure of consideration is equivalent to recoupment.

Jackman v. *Doland,* 116 Mass. 550.

It is further held in Massachusetts that mere non-fulfilment, in any respect, of a contract is a sufficient defense to a note given in consideration therefor.

Hawks v. *Truesdell,* 12 Allen, 564.

31. This assignment of error states an abstract proposition of law, which the Court was not required to give. Even if true, it conveys no information to the jury standing by itself.

32. This assignment of error seems to involve to some extent the same issues of fact and law as those which are involved in assignments of error numbered 26 and 27; and to avoid redundancy, the respondent is content to have the Court regard the argument with reference to the 26th and 27th assignments apply to this assignment. But in addition the respondent submits:

As to the 7th request, while the respondent has already pointed out that the plea of failure of consideration could not in law be said to be tantamount to recoupment, yet even if it were, the Court was not bound to adopt the literal request. Nor could it have served any useful purpose, because the jury would presumably have been unfamiliar with the significance of the legal terms employed in the request.

Respondent's views on the 8th and 9th requests are covered by its argument on the 26th and 27th requests.

33. (10) This is an erroneous statement, and if given in the form requested would be likely to confuse the jury. What the agreements between the parties were had to be determined upon all the evidence in the case and not by an

examination of certain exhibits. The identification of the subject-matter of the contract, its meaning, the blueprints submitted, and the conversations between the parties were all essential to a proper understanding of the agreements between the parties.

It is respectfully submitted that, in principle, the petitioner's position under this assignment is inconsistent with its position under assignment numbered 1, because the latter assignment would seem to be predicated upon the theory that the March 1st agreement was intended by the parties to cover their entire undertakings. This assignment seems to waive that position. The respondent agrees that the entire contract was not contained in the March 1st agreement and rider attached, but contends that the petitioner has not gone far enough in describing the evidence from which the same agreements must be adduced.

(11) This request was granted. See page 218 of the record.

(12) This is a vague statement. Exhibit 14, referred to in this assignment, is not set forth in the record. Even if it were, the request requires the jury to cull out that portion of said Exhibit 14 which deals with capacity without giving the jury any aid either in the evidence or from the Court as to how that process should be accomplished. There were, furthermore, other elements entering into the meaning and extent of "capacity." The Court instructed the jury on the capacity required of the machine (R. pp. 218-220). The Court was not bound to adopt the literal language of the request or subject the jury to the futile search which this request necessarily entailed.

34. (13 to 15) These requests are not accurate or complete characterizations of the specifications, certain portions of which are more fully set out in the foregoing statement of the cases. The true meaning of the term "bend" as used in the specifications was for the jury on all the evidence. The terms "bend" and "set" have been discussed

hereinbefore under assignment number 2 and Statement of the Cases, Part One.

(70) The judge refused this request because, as he said in his charge, "I don't personally get the idea of what you want to set steel for, or bend it rather, without setting. I don't quite see what that amounts to, but you are the arbiters of that. . . ." (R. p. 219).

The subject-matter of this assignment has been additionally discussed under assignment No. 2 and what has been said before under (70) as supplemented by the argument under assignment 2 applies equally to assignments numbered 71, 72, 73, 74, 75, and 76.

35. (16) The subject of this request was a matter for determination by the jury on all the evidence.

(17) This request is not accurate in that it does not set out the specifications in proper detail or accurately, nor their full effect. Furthermore, the general purposes of an agreement cannot be disregarded in interpreting its express terms.

(18) This request deals with a contention, and not with an interpretation of the alleged contract.

(19) This request presupposes that it satisfied the entire obligations of the petitioner. The respondent contends that it did not. Many of the subsidiary issues which were involved in the determination of the true obligations or the extent thereof were issues of fact. This position of the respondent has previously been argued, and, in the interest of expedition, the argument will not be repeated.

(63) This is a mere isolated, academic statement of law, and the judge was therefore not bound to give it.

(64) This assignment has been argued in substance (Assignment 2).

(68) The jury presumably understood the respondent's claims. It was not incumbent upon the judge to state them in this literal language. In fact, the language did not cover the respondent's claims as made.

(69) This assignment, in another form, has been discussed. The Court was not required to accept the language of the request; if it did, it would not have helped the jury.

36. The petitioner here pieces together portions of the charge in such a way as to present a picture which is entirely inconsistent with the charge when read as a whole. If so read, and in the light of the entire record, the charge is correct, and not harmful to the petitioner.

Amer. Ry. Express Co. v. *MacDermott*, 44 F. (2d) 955 (C.C.A. 3d Circ.).

The assignment is by no means set forth in the form in which the exceptions upon which it is based were noted (R. p. 222).

Ohl represented in addition that the machine ". . . will bend the heavy gauges of metal with ease and you can also bring out in *fine detail* multiple bends which cannot be successfully accomplished under the lighter machines of this class" (R. p. 48). (Italics ours.)

The evidence of the preliminary negotiations between the parties was not in dispute. Ohl held himself out as being skilled in manufacturing power presses, and Smith told him that he, Smith, required a press that would produce steel stairs and stringers. Ohl undertook to study Smith's needs and produce such a machine (R. pp. 14 to 17; 145).

On this and cumulative evidence of this kind, all of which was not in dispute, the sale having been made, it is submitted that the warranty of fitness could have been implied as matter of law.

But at frequent intervals throughout the charge the judge warned the jury that they were the final arbiters of the facts; and in finally summarizing the situation he said at R. p. 220: "Now it is up to you to say on this whole case in the first place, did the machine do or would the machine have done, if properly handled and operated the work in turning

or bending these soft steel plates? If you find that it would do that, then your verdict must be for the full amount of what they [petitioner] are suing for."

The respondent submits that the party really harmed by this expression of the law was the respondent itself, and not the petitioner.

37. (20) The subject of this request was a matter for determination by the jury on all the evidence.

(21) Professor Townsend of the Institute of Technology, an expert offered by the respondent, testified, in substance, that such machines as the one in question are commonly equipped with safety devices and that it was not proper construction to omit such a device from the machine in question (R. pp. 97 and 98). The express warranty of the petitioner distinctly stipulates that the machine is of the best workmanship and material and that it will bend soft steel of a thickness of three eighths of an inch. One of the stanchions of the machine broke while the professor was testing the machine. Mr. Perkins, a manufacturer of this class of presses, testified in effect that unless a press of the kind contemplated by the parties in this case had a factor of safety of 6 to 1 it should be equipped with a safety device; and "that the machine was far below in factor of safety to properly do the ⅜ by 12 foot sections it was designed or guaranteed to do" (R. pp. 111, 112, 113). Mr. Ohl testified that if the friction clutch on the machine was not properly adjusted, the machine would break and that that clutch constituted a safety device (R. p. 148). Moreover, it is respectfully submitted that it was not incumbent upon the Court to adopt the specific language or interpret a detached part of the agreement or to give the jury such a negative instruction as the petitioner, in this instance, requested.

(22) As to the contents of the express warranty, it speaks for itself. As to the effect of the express warranty with respect to whether it involved the necessity for a safety device, Professor Townsend testified that in constructing such

a machine, to prevent a rupture of some vital part, some sort of safety device ought to be installed, and that otherwise it would be improper construction (R. p. 98). Mr. Ohl said this friction clutch is a safety device (R. p. 148).

(23) This request is ambiguous. If the word "design" is to be taken as synonymous with "object" or "purpose," the subject-matter of it ought to be left for determination by the jury. Furthermore, the entire tenor of the warranty is not set forth in this request (R. p. 11). It is submitted that the Court is not required to single out a specific phase of the warranty and make specific comments on it as this request would seem to require.

(23a) This request clearly contains an incorrect statement of the warranty; the capacity as called for by the request is insufficiently stated. The comments already made as to the previous request, 23, dealt with under this assignment, would seem to be equally applicable to this. This assignment is predicated upon a request which, as submitted to the Court, describes the thickness of soft steel referred to as 3/6 and not 3/8 as described in the assignment.

(24) This request begs one of the principal questions in the case. There is no evidence of operation in excess of the capacity of the machine. The Court is not required to assume as a fact that the machine had the "capacity called for." That is one of the very decisive questions which had to be submitted to the jury for determination.

38. The very language of this request implies that the point raised by it is to be left to the jury; and it was, in fact, so left.

39. (25) Specifications are not available as evidence. Even if they were, the respondent submits that the Court is not required to state a fragmentary specification any more than if it were a detached portion of the evidence.

Hanley v. *Eastern Steamship Co.*, 221 Mass. 125, 135.

(26) The respondent submits that the Court is not required to single out a fact and state the same to the jury in its charge, even though that fact, standing by itself, be not controverted. The jury is presumed to have it in mind.

Hanley v. *Eastern Steamship Co., supra.*

(27) Mr. Smith's "actual knowledge" of the defects of the machine are matters for determination by the jury and not by the Court. Moreover, what is "fairly within the scope of specifications 3A to E inclusive" is clearly for the jury to determine.

Powers v. *Bergman,* 197 Mass. 39, 41.

(62) Among other objections to this request would seem to be its generality. Besides, it does not appear that the specifications cover all claims of the respondent; they are merely the particulars called for by the petitioner's motion for specifications.

McDonough v. *Boston Elevated Ry. Co.,* 208 Mass. 436.

40. (65) It is assumed by the respondent that the petitioner is restricted in the matter of assignments of error to the exceptions or rulings upon which they are based, and that such descriptive matter as is contained in paragraph 40 (R. p. 257) is not germane to the assignments. The actual requests upon which assignments 65, 66, and 67 are predicated make no reference whatsoever to Gen. Laws, c. 106, sec. 38.

As was said with reference to previous requests, it was not incumbent upon the Court to state to the jury any of the facts, and particularly a fragmentary or detached portion of the evidence. Whether "the lack of any safety device other than the 25-inch diameter friction clutch was or was not apparent to Smith at the time the machine was delivered and assembled before April 15th, 1926," was clearly

a matter for the jury on all the evidence. The machine was not only massive, but extremely intricate, as the evidence related in the bill of exceptions and exhibits will show; the respondent company, as the evidence will show, was not in the business of dealing in machinery, but used it as an incident to the fabrication and erection of steel.

(66) It is respectfully submitted that there was no occasion for a notice to the effect that the machine did not contain a safety device "other than such friction clutch" prior to Exhibit 20 of November 22, 1926. It would seem to be sufficient notice that the clutch was not effective (contrary to the testimony of Mr. Ohl above referred to). Moreover, it is not incumbent upon the Court to point out the omission of an isolated fact, particularly where such omission could not be decisive of the whole case.

Trimount Lumber Co. v. *Murdough,* 229 Mass. 254, 255.

(67) It was one of the contentions of the respondent that the press was defective in that it lacked a proper safety device; the petitioner challenged this contention and claimed that the 25-inch diameter friction clutch supplied that requirement and acted as a proper safety device. Thus an issue was made with reference to this particular complaint. It was therefore not incumbent upon the Court to instruct the jury in accordance with request No. 67; and furthermore, it is assumed that the damage sustained by the respondent was not for any given defect, but to the whole machine as it might be affected by such defects as the jury found to exist.

41. (28) It was not incumbent upon the Court to point out the isolated fact asked for in this request.

The respondent desires to make the same comment upon paragraph 41 (R. p. 257), which was just made with reference to paragraph 40 on that page.

(29) This request calls upon the Court to state an abstract proposition of law. The mere acceptance of this machine would not prevent the respondent from recovery for breach of warranty.

General Laws of Mass. c. 106, sec. 49.

(30) The Court was not required to state this abstract proposition of law. In effect the Court granted this request, since it granted request for ruling No. 31 filed by George A. Ohl Company (R. pp. 214, 218).

(33) It is submitted that this request was improper for the reason that it fails to state the circumstances preceding and attending the giving of the notice therein referred to, such as: The respondent company was a fabricator of steel and had had no experience with this class of machine until it was installed in the respondent's plant (R. pp 15-18). The respondent's employee, Hovasse, had been sent over to the petitioner's factory to acquaint himself with the operation of the machine in February of 1926; he had never seen such a machine before (R. p. 70). The tests made at Newark when Hovasse was there were not at a 90° angle; the steel that was used was copper backed (R. pp. 82-83); Mr. Ohl of the petitioner company testified that during the instructions which were given Hovasse at the petitioner's factory no ⅜" steel was operated upon and no 3" dies were used and no 12-foot lengths were applied to the machine (R. pp. 163-164). Ohl further admitted that he suggested to Hovasse the use of a 2" die; at Ohl's plant during the instructions the power unit was not installed—instead a temporary motor was being used (R. p. 70); he then noticed that he could not move the shaft; he took the bearing out and found it "kind of bound" in places and succeeded in fixing it so that it would turn, and then cleaned the shaft and put the assembly back (R. p. 72); nothing more was done on that day; no dies were set until three days thereafter (R. p. 73); at the time that the trouble occurred with the shaft, Hovasse

knew nothing of the peculiarities of the iron (R. p. 74); no stringer stock was bent until August or September of that year (R. p. 91). The petitioner's operator did not notice anything out of the ordinary outside of a lot of deflection on short pieces, like risers; it did not seem to do any harm but it did heat some (R. p. 85). The adjustment was by "trial and error" (R. p. 149).

(34) This request is too vague to be of any value to the jury, and the Court was warranted in refusing it.

(39) This request is not in accordance with the fact. The respondent sent a notice of defect on August 13, 1926, which fact was not in dispute (Exhibit EE, R. p. 31).

(40) This request was erroneous, since the subject-matter of this request was properly for the jury's determination.

(41) The Court was not required to grant this request either in substance or in its literal terms. The motion for specification No. 3 called upon the respondent to furnish the petitioner particulars as to unsatisfactory service from the outset (R. p. 234). In the answer thereto the petitioner adopts the language of the motion and sets forth those things which occurred then and thereafter. The respondent set forth five particulars in its answer to paragraph 3, but did not specify that all these defects occurred on April 15, 1926, as the petitioner now attempts to interpret this specification. The petitioner made no such contention at the trial, and evidence was introduced by it showing the times when the respondent observed these successive defects. The petitioner therefore cannot, for the first time after the verdict, assert a grievance based upon alleged departures from the specification.

Turner v. *Twing,* 9 Cush. 512, 514, 515.

(42) The Court, pursuant to the petitioner's request No. 31, ruled on the timeliness of notice. It is submitted that request No. 42 was improper for the reason that it fails to state the circumstances preceding and attending the

giving of the notice therein referred to, such as: After the letter of June 25th from the respondent to the petitioner the latter replied suggesting merely that the respondent use more oil (Exhibit DD, R. p. 31); in the meantime no heavy work was as yet being bent by the respondent; it was confining itself to small pieces, such as stairs and treads, but the heating seemed to continue; the machine was allowed to cool at intervals; on August 13th, the respondent wrote another letter complaining of the machine, and on August 16th the petitioner wrote its then attorney in Boston enclosing copies of the June 25th letter and the reply thereto of June 28th (Exhibit KKK, R. p. 92), as a result of which the Boston Engineering Company was retained by the petitioner to take down a portion of the machine, and then it appeared for the first time that a blow-hole existed in the casting "where the 16" bushing goes in" (R. p. 63); it also then appeared that part of the brake was broken and that two blow-holes showed at the fractures in the brake (R. p. 63); some heavy work, such as 6-foot lengths, was begun in July, and began to show center deflection (R. p. 63).

(43) This request is too vague to be of any value to the jury, and the Court was warranted in refusing it.

(44) The respondent's argument under assignment 41 is equally applicable to this assignment.

(45) The Court would be warranted in refusing to give request No. 45, because of its uncertainty and vagueness. It does not appear what notice is referred to.

(46) The Court is not required to instruct the jury as to an isolated portion of the evidence.

(47) The argument made by the respondent under assignments (41) and (42), just above, are equally applicable to this assignment.

(48) This is not a correct statement of Smith's evidence. Besides, it is not incumbent upon the Court to select a portion of the evidence and repeat it to the jury even if it is uncontroverted.

(49) The argument made by the respondent under assignments (41) and (42) above is equally applicable to this assignment.

(52) The respondent submits that the judge was not required to give request No. 52. The knowledge the respondent had or was charged with was a matter that was peculiarly within the province of the jury. Moreover, the petitioner seeks first to obtain a ruling of law that one specification is within the scope of another specification and then that both of the specifications are within the knowledge of the respondent. Obviously, this is not a proper subject for a request to charge the jury.

(55) It is submitted that this request was improper for the reason that it fails to state the circumstances preceding and attending the giving of the notice therein referred to. The respondent has heretofore, under assignments (33) and (42), set forth as briefly as possible the successive experiences that the respondent had with the machine in question. As has been previously stated, the heavy work, such as stringers, was not bent until some months after the machine arrived, approximately July of 1926 (R. pp. 63, 86). Then the bowing began to appear. Thereafter a Mr. Kolarsy, superintendent of the petitioner company, arrived in Boston, to wit, on or about September 1st; it was on that occasion that an inspection of the machine was made by Kolarsy, who came five days after a letter from the respondent to the petitioner (Exhibit JJ, R. p. 37), in which it was suggested that the petitioner send its manager, that the machine would be down Thursday and Friday, and containing the suggestion: "don't form conclusions—seeing is believing." It was on this occasion that the oral notice referred to in the request now under discussion was given (R. p. 14).

(58) The respondent submits that this request was erroneous and that the Court was not obliged to single out isolated facts to be considered by the jury.

(59) This request is not in accordance with the evidence. It appeared from the testimony of Mr. Smith that up to June 25, 1926, the petitioner had not tried any ⅜" steel bending (R. p. 31), and that the "bowing was not called to Smith's attention until several months had elapsed" (R. pp. 56, 57). Furthermore, this request is invalid because it depends upon a conjecture as to what the jury would find the defect was due to. It is, moreover, vague.

(60) In view of the erroneous nature of request No. 59, request No. 60 could not, of course, be granted. In addition this request called for isolation of particular facts, and it is submitted that the Court is not required to segregate facts in the form requested by a party.

42. The petitioner, having requested the Court to rule upon this question, as matter of law, cannot now complain that the judge acceded to its request, after the judge made a finding adverse to its contentions. The respondent submits that the Court's finding was clearly correct.

Barrett Co. v. *Panther Rubber Co.*, 24 F. (2d) 329, 336.

Gascoigne v. *Cary Brick Co.*, 217 Mass. 302, 305.

Taylor v. *Cole*, 111 Mass. 363.

Trimount Lumber Co. v. *Murdough*, 229 Mass. 254.

Nashua River Paper Co. v. *Lindsay*, 242 Mass. 206.

It is submitted that the Court saw the parties, photographs of the machine, exhibits, and correspondence, and exercised his judgment properly in determining the reasonableness of notice. There is nothing in the record which requires a different conclusion from that reached by the Court upon a consideration of the evidence before it. The respondent respectfully refers to its Statement of Facts, Part One of this brief, setting forth briefly the nature of the correspondence and controversy between the parties.

Moreover, the petitioner made no complaint in its letters or through its representatives who called at the respondent's plant and made no objection that the respondent was dilatory in the giving of its various notices or any of them; much, if not all, that the respondent complained about was either known to the petitioner as existing evils in the machine or was, according to some of its own letters, inferred by it.

See *Rittenhouse W. Auto Co.* v. *Kissner,* 129 Md. 102; 98 Atl. 361.

The petitioner suffered no harm or prejudice by reason of the intervals that elapsed, and there was no showing of any change in the situation between the parties or in the condition of the machine by reason thereof other than what would follow from the normal developments. The petitioner showed no great anxiety or solicitude even after the receipt of the first notice by it. It was not until the respondent threatened to refer the matter to its counsel that the petitioner became solicitous (Exhibit EE, R. p. 31).

The respondent should not be reproached for endeavoring to do such minor things as might enable it to operate the machine before rushing to complain the very moment its first difficulty was encountered.

The indifference of the petitioner is indicated by its correspondence and its assurances that there was nothing the matter with the machine, other than lack of oil and operation by an "automobile mechanic"; such trifling references reflect against the petitioner—not against the respondent.

Sturm v. *Williams Oven Mfg. Co.* (1922), 201 App. Div. 113; 193 N.Y. S. 852.

43. It would seem to be clear that, if the Court adopted this request, and even if the law stated in it was proper, it would merely be stating an abstract proposition of law which would, presumably, be meaningless to the jury and

the literal language of which the Court would not be required to adopt.

44. (35) The law of Massachusetts, as the respondent understands it, is that a notice under the Sales Act need not specify particular defects. A general claim of damage is sufficient.

Trimount Lumber Co. v. *Murdough,* 229 Mass. 254, 256.

All the notices, except one, were by mail and are set forth verbatim in the record. The exception referred to was an oral notice given to the petitioner's representative, Mr. Kolarsy, when he called at the respondent's plant on September 1, 1926 (R. p. 67).

(36) While respondent's letter, Exhibit CC, does erroneously refer to the "fly wheel bearings" when it should have said "fly wheel shaft," the petitioner's reply, Exhibit DD (R. p. 31), clearly indicates that the petitioner recognized the error by saying: "Any machinist should be able to take down the *fly wheel shaft* etc." Again, at page 82 of the record, it appears that the bearings referred to are mounted upon the shaft referred to, and that from Exhibit DD the respondent learned that the petitioner understood the true location (R. pp. 82, 83). Under these circumstances it is submitted this request was properly refused.

The petitioner now impliedly admits that this error was purely inadvertent and did not mislead the petitioner (Petitioner's Brief, p. 58).

(37) What has been said with reference to No. 36 seems to be equally applicable to this request; but, moreover, it is submitted that whether the notice satisfied "the requirements of the Sales Acts as to notice" would have meant very little to the jury and need not have been adopted by the Court.

(38) What has been said of Nos. 35 and 37 with reference to the duty of the Court seems to be equally true of

No. 38. It is interesting to note that in this assignment the petitioner records the next notice after June 25th as being that of August 13th (R. p. 260), whereas, in its assignment 39 (R. p. 238), the petitioner states that the next notice after June 25th is that of August 23d.

(50) Again, the petitioner is in obvious error since the next notice which the petitioner itself asserts is August 23d, a written notice (Exhibit II, R. p. 35).

(51) Any fault which the petitioner had to find with the specifications should have been called to the Court's attention before the verdict.

(56) In so far as this is a mere statement of a fact, the Court is not required to state it to the jury; in so far as it imports a specification, it is not a matter upon which the Court is required to comment.

(57) Nor is the Court required, as matter of law, to instruct the jury that the notice of September 3d, or any other notice previously given, did or did not "satisfy the statute as to notice."

As has been pointed out, the law does not require that the notice contain specific defects.

> *Trimount Lumber Co.* v. *Murdough,* 229 Mass. 254, 255.

45. The judge need not refer to all facts if he informs the jury, as the judge in this case did, that all issues of fact are to be determined by them. Furthermore, Ohl admitted (R. p. 171) that the foundation constructed for the machine by the Smith Company was proper.

46. It is obvious that this question was for the jury. The respondent respectfully refers to its Statement of Facts. If anything, this instruction would seem to be quite favorable to the petitioner.

48. In substance the Court left it to the jury to say on all the evidence what the machine in question was worth before the break, assuming that it would not do the work for which

it was purchased, and merely indicated in a general way parts of the evidence which might aid the jury in coming to their conclusion. It was, of course, essential for the jury in assessing damages to fix in their minds the value of the machine before and after the break. In fairness to the Court, other portions of the charge should be read in conjunction with this paragraph.

The last sentence under assignment 48 is an obvious misquotation from the judge's charge at R. p. 218. It gives the impression that the thought intended to be expressed by the sentence ending ". . . what is it" carries over to the next sentence, which is palpably wrong (R. p. 220). This situation is similar to that appearing under assignment 36 (R. p. 255). Neither of these assignments is predicated in precise form upon a corresponding exception to the charge; see R. p. 221, to R. p. 223, which contains all of the specific exceptions to the charge.

49. So far as the first sentence opening with the word "may" and ending with the word "machine" is concerned, this instruction is necessarily predicated upon the condition stated in the preceding paragraph of the charge, to wit: "if, on the other hand, you find the machine would not do it [the work intended]"; thus read it would seem that those items of expense, if the jury arrived at the question of damages, would be properly allowable. The remaining sentence in the portion of the charge set forth in assignment 49, read in conjunction with the same predicate, would seem to be a proper element of damage. This relates to the repairs which the respondent made after the break and for the purpose of preventing further breakage and using the machine in the limited way to which the break and the repairs confined it. This item is specifically alleged in the plaintiff's declaration as an element of damage (R. p. 230).

50. The Court's charge was proper and left the issues of fact to the jury. The issues in the case at its end became extremely simple. Prolix requests of the number and kind

presented by the petitioner, setting forth inaccurate statements of fact, singling out portions of the testimony, and presenting abstract questions of law, have a tendency to confuse rather than aid the jury. It is submitted that the jury had all the facts before it, and it must be presumed that they remembered and understood the testimony, and it was not necessary for their clear comprehension of the case to go any further than the judge went in this cause.

This assignment of error is clearly an objection to the charge as a whole, and therefore invalid.

51. The respondent respectfully refers to the argument under assignment of error 50.

52. The respondent respectfully refers to its argument previously made in 50 and 51 under various assignments of error, and asserts that this assignment is invalid because it is an objection to the charge as a whole.

53. The Court specifically charged the jury: ". . . if you find that it would do that, then your verdict must be for the Ohl Company for the full amount of what they are suing for" (R. p. 220).

54. In so far as the motions for a new trial are predicated upon the alleged intention of two jurymen with respect to the verdicts, they depend exclusively upon a mere private conversation between said jurymen and petitioner's counsel (R. p. 226). The denial of said motions for new trial was, in all respects, within the discretion of the judge.

Damages.

In Massachusetts the question of whether a contract is entire or separable is one of intention. Where, as in the case at bar, several articles are included in one sale at one all-inclusive price which is paid or to be paid without regard to apportionment, it is ordinarily an entirety.

Barlow Mfg. Co. v. *Stone,* 200 Mass. 158, 160, cases cited.

The statement by the judge with reference to the dies could not have meant what the petitioner attributes to it at pages 78, 79, of its brief. If the petitioner believes it did, it is itself inconsistent, because obviously the payments by the respondent aggregating $5000 were on account of the *total* purchase price, including the dies; and the action of the petitioner was for the unpaid notes which also contemplated the total purchase price without apportionment.

There was not a shred of evidence of the *value* of the dies, one way or the other. What the petitioner probably refers to are estimates of costs of dies (Exhibit F, R. p. 19). Respondent's letter (R. p. 20) orders the dies and says: "It is of course important that these dies be shipped at the same time with the machine . . ." Then follows more correspondence and, ultimately, the Memorandum of Agreement (R. pp. 11-12), which includes the dies, the machine, and sundries "for the sum of $12009.68," being the total price without any indication of separation or allocation.

So that the respondent submits that its analysis of the verdicts is in accord with the law as well as the evidence.

Conclusion of This Branch of the Case.

St. Feb. 26, 1919, c. 48 (Judicial Code, sec. 269, as amended), provides:

> "All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any cases, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The respondent respectfully submits that on the whole record now before the Court there was no error committed at the trial; or, if there was, it was so harmless as not to have affected the substantial rights of the petitioner.

Gilmer v. *Higley*, 110 U.S. 47.
Vicksburg &c. Rd. v. *O'Brien*, 119 U.S. 99, 109.
Grimes v. *Malcolm*, 164 U.S. 483, 492.
Kalanianole v. *Smithies*, 226 U.S. 463.
Seaboard Railway v. *Moore*, 228 U.S. 433.
Pennsylvania R.R. Co. v. *Olivit Bros.*, 243 U.S. 574, 585.
Horning v. *District of Columbia*, 254 U.S. 135.
Rumsey v. *N.Y. Life Ins. Co.*, 267 F. 554 (C.C.A. 9th Circ.).
Rosen v. *United States*, 271 F. 651 (C.C.A. 2d Circ.).
United States v. *Penn. R.R. Co.*, 283 F. 937 (C.C.A. 4th Circ.).
Robilio v. *United States*, 291 F. 975 (C.C.A. 6th Circ.).
Blakeslee v. *United States*, 32 F. (2d) 15.
Redmond v. *United States*, 8 F. (2d) 24.
Brown v. *Carver*, 45 F. (2d) 673 (C.C.A. 2d Circ.).

Wherefore the respondent respectfully submits that under either branch of the case writs of certiorari should not issue.

Respectfully submitted,

LOWELL A. MAYBERRY,
ROBERT GALLAGHER,
MARTIN WITTE,
SAMUEL ABRAMS,
Attorneys for
THE A. L. SMITH IRON WORKS,
Respondent.

SUPREME COURT OF THE UNITED STATES.

Nos. 228 and 229.—October Term, 1932.

George A. Ohl & Company, Petitioner, 228 *vs.* The A. L. Smith Iron Works. George A. Ohl & Company, Petitioner, 229 *vs.* The A. L. Smith Iron Works.	On Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 6, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In these actions at law, tried together before District Judge James A. Lowell and a jury, respondent obtained judgments and petitioner appealed to the Circuit Court of Appeals. The records on the appeals contained what purported to be bills of exceptions signed by the attorneys for the respective parties and initialed by the District Judge as follows: "Allowed August 20, 1930, J. A. L., D. J". The Circuit Court of Appeals affirmed the judgments upon the sole ground that the bills of exceptions were not sufficiently authenticated and that it was too late to send the cases back for amendment as the term for which the judgments were entered had expired and the District Court had lost jurisdiction. 57 F. (2d) 44. This Court granted certiorari. 287 U. S. —.

There is no question that District Judge Lowell affixed his initials to the bills of exceptions and intended in this manner to authenticate them as allowed. Apparently in connection with petitioner's application for a rehearing in the Circuit Court of Appeals, Judge Lowell addressed a communication to the judges of that court stating that the bills had been seasonably presented to him and that he had signed them with his initials intending that they should have full legal effect; he requested that the bills should be returned to him for correction.[1] There was also submitted to

[1]District Judge Lowell's communication contained the following:

"It has been called to my attention that I signed the bills of exceptions in the above two cases with my initials only instead of with my full signature.

the Circuit Court of Appeals a certificate by the clerk of the District Court in which it was stated: "It has been the practice in this district for a long time for judges, the clerk and deputy clerks and the bar to treat as sufficiently allowed for appellate purposes bills of exceptions signed by the trial judge with either his full name or his initials". The petition for rehearing was denied.

Under the statute of Westminster 2, 13 Edw. I, ch. 31, it was essential that exceptions should be authenticated by the seal of the trial justice. *Enfield* v. *Hills,* 2 Lev. 236; 2 Inst. 427, 428; 2 Bac. Abr., 326, 327; 2 Tidd's Pr., 789; *Nalle* v. *Oyster,* 230 U. S. 165, 176; *Krauss Bros. Co.* v. *Mellon,* 276 U. S. 386, 389, 390. In the practice of the federal courts, however, it was held that a seal was unnecessary, the signature of the trial judge being sufficient. *Generes* v. *Campbell,* 11 Wall. 193, 198; *Herbert* v. *Butler,* 97 U. S. 319, 320. Compare *Mussina* v. *Cavazos,* 6 Wall. 355, 363; *Young* v. *Martin,* 8 Wall. 354, 357. The Act of June 1, 1872, c. 255, § 4 (17 Stat. 197, R. S., § 953) expressly dispensed with the necessity of a seal but retained the requirement of the signature of the judge of the court in which the cause was tried. *Herbert* v. *Butler, supra; Malony* v. *Adsit,* 175 U. S. 281, 286, 287; *Krauss Bros. Co.* v. *Mellon, supra.* As amended by the Act of June 5, 1900, c. 717 (31 Stat. 270, 28 U. S. C. 776), the statute provides for the signature of another judge of the court in certain contingencies.[2]

They were seasonably presented to me for allowance and I told counsel for the Appellant presenting them, after examination of them, that I allowed them, did nothing more with respect to them in counsel's presence and counsel departed. I later signed them intending so to sign them that they should have their full intended legal effect but not knowing any better I signed them only with my initials; that was my personal mistake to which neither the Appellant nor its counsel in any way contributed. I desire if I have the power and your permission now to correct my personal inadvertance by completing my signature so that my allowance of each bill may have my full signature and as of August 20, 1930. I therefore request, so far as I properly may, that the record be returned to the District Court for such correction by me as now within my power to make".

[2]Section 953 of the Revised Statutes, as amended by the Act of June 5, 1900, c. 717, 31 Stat. 270, 28 U. S. C. 776, provides:

"A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter

The statute does not prescribe the form of signature. The manifest purpose is authentication by the proper judge. In the absence of such authentication there is no bill of exceptions which the appellate court may consider. *Malony* v. *Adsit, supra; Metropolitan Railroad Co.* v. *District of Columbia,* 195 U. S. 322, 330; *McCuing* v. *Bovay,* 60 F. (2d) 375, 376; compare *Christy* v. *Pridgeon,* 4 Wall. 196, 201, 202. Appropriate disapproval of the practice of signing by initials such important documents as bills of exceptions, and insistence upon a method of signature more in keeping with the formal character of the proceeding, do not reach the question now presented. That question is not whether the signature is informal but whether there is a signature. If the attempted authentication by Judge Lowell be deemed to be merely informal or irregular, but not a nullity, the defect could be disregarded or cured by amendment. R. S. § 954, 28 U. S. C. 777. See, also, 28 U. S. C. 391. Thus, in *Idaho and Oregon Land Company* v. *Bradbury,* 132 U. S. 509, the clerk of the court below in attempting to authenticate the record had appended the seal of the court but had failed to comply with the rule of this Court in affixing his signature. The Court said (p. 513): "The question presented is not one of no authentication, but of irregular or imperfect authentication; not of jurisdiction, but of practice. It is therefore within the discretion of this court to allow the defect to be supplied". And as it appeared to be then "too late to take a new appeal or writ of error", the Court permitted the record to be withdrawn "for the purpose of having the certificate of authentica-

be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he can not fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor".

tion perfected by adding the signature of the clerk". A defect or inaccuracy in mere matters of form can be corrected notwithstanding the end of the term. *United States* v. *Mayer*, 235 U. S. 55, 67.

The Circuit Court of Appeals felt constrained to reach its conclusion, that the attempted authentication was a nullity, by reason of the decisions of this Court in *Origet* v. *United States*, 125 U. S. 240, 243, 244 and *Kinney* v. *United States*, 222 U. S. 283, 284. Neither of these decisions is strictly in point. In the *Origet* case, at the foot of a paper entitled "Bill of Exceptions", appeared the following: "Allowed and ordered on file November 22, '83. A. B". Referring to the Act of 1872 (R. S., § 953) the Court said: "This provision merely dispensed with the seal. The necessity for the signiture still remains. We can not regard the initials 'A. B'. as the signature of the judge, or as a sufficient authentication of the bill of exceptions, or as sufficient evidence of its allowance by the judge or the court. Therefore the questions purporting to be raised by the paper cannot be considered". In the *Kinney* case, the record did not contain any bill of exceptions. There was a paper styled "Exceptions to the charge to jury", which was initialed "J. B. McP. trial judge" and signed by the plaintiff. The Court said that this paper was "not a bill of exceptions," citing the *Origet* case, but the Court added that "if it were to be treated as a bill of exceptions" it could not avail, as all the matters in question "depended upon examination of the evidence which is not in the record" and hence the Court had "no means of determining whether reversible error arose from the action of the court on any of the subjects to which the paper refers". Thus, in the *Kinney* case the present question was not necessarily involved, and in the *Origet* case the Court was unable to regard the initials as the signature of the judge. In the instant case, it appears that the trial judge did affix his initials in order to authenticate the bills of exceptions and he added the initials "D. J." for the obvious purpose of referring to his office and characterizing his action as official. So far as the statements in the opinions of the *Origet* and *Kinney* cases may be taken to imply that such an authentication by the trial judge is void and that bills of exceptions so allowed cannot be considered, or the informality be corrected, the statements are not approved.

The statute contains no indication that the word "sign" is used in other than the ordinary sense. The statute gives neither definition nor qualification. Signature by initials has been held to be sufficient under the Statute of Frauds[3] and the Statute of Wills and in other transactions.[4] It has been held in some States[5] that a different rule obtains in the case of the official signature of certain judicial officers, but the Congress has not established such a rule for the judges of the federal courts. Nor, in the absence of special statutory requirement, is there a uniform custom in relation to official signatures. It may be assumed that a requirement of the officer's signature, without more, means that he shall write his name or his distinctive appellation, but the question remains as to what writing of that character is to be deemed sufficient for the purpose of authenticating his official act. There is no rule that he shall adhere to the precise form of his name as it appears in his commission. The full name of the officer may or may not be used. Not infrequently christian names are omitted, in part or altogether, or are abbreviated or indicated by initials. In some of the most important communications on behalf of the Federal Government, only the surname of the officer is used. When an officer authenticates his official act by affixing his initials he does not entirely omit to use his name; he simply abbreviates it, he uses a combination of letters which are part of it. Undoubtedly that method is informal, but we think that it is clearly a method of "signing". It cannot be said in such a case that he has utterly failed to "sign", so that his authentication of his official act, in

[3]Salmon Falls Manufacturing Co. *v.* Goddard, 14 How. 446, 454; Phillimore *v.* Barry, 1 Camp. 513; Chichester *v.* Cobb, 14 L. T. (N. S.) 433, 443; Sanborn *v.* Flagler, 9 Allen 474, 478; Smith *v.* Howell, 11 N. J. Eq. 349, 357, 358; Burns *v.* Burrows, 196 Iowa 1048, 1056; Browne on the Statute of Frauds, 5th ed., sec. 362.

[4]Re Savory, 15 Jur. 1042; Knox's Estate, 131 Pa. St. 220, 229-232; Estate of Kimmel, 278 Pa. 435, 440, 441, 31 A. L. R. 688; Pilcher *v.* Pilcher, 117 Va. 356; Merchants Bank *v.* Spicer, 6 Wend. 443, 447, 448; Brown *v.* Butchers & Drovers Bank, 6 Hill. 443, 444; Palmer *v.* Stephens, 1 Denio 471, 479; Weston *v.* Myers, 33 Ill. 424, 432; Jarman on Wills, 6th ed., pp. 107, 108.

[5]See Fairbanks *v.* Beard, 247 Mass. 8; Smith *v.* Geiger, 202 N. Y. 306; Conery *v.* Creditors, 115 La. 807. Compare Blades *v.* Lawrence, L. R. 9 Q. B. 374. See, also, 29 A. L. R. Ann. 919, *et seq.* 72 A. L. R. Ann. 1290, *et seq.*

the absence of further statutory requirement, is to be regarded as absolutely void.

We do not approve the signing of bills of exceptions merely by the initials of the judge, but we regard the question as one of practice,—of regularity, not of validity. In the instant cases, the District Judge authenticated his allowance of the bills of exceptions by a form of signature easily and actually identified as his. No one was misled or injured. We perceive no reason why petitioner should lose its right to have the rulings upon the trial appropriately reviewed by the appellate court, merely because the District Judge failed to sign his full name. This is precisely the sort of defect which the Congress has provided shall not impair the substantial rights of the parties. 28 U. S. C. 391. At most, in the interest of a better practice, the bills of exceptions could have been returned for a more formal signature, but even that course was not necessary.

The judgments are reversed and the causes are remanded to the Circuit Court of Appeals for hearing upon the merits.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.